Supreme Court, U.S.
FILED
05-84 JUL 11 2005
OFFICE OF THE CLERK

No. ——

In the Supreme Court of the United States

ROSEMARY C. BUTCHER ET AL.,
Petitioner,

v.

JOBST W.F. BLACHY, ET AL.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the judicial power of the federal courts under Article III, Section 2 [1] To suits against the Internal Revenue Service?

2. Whether a judgment in a case removed from State Court is void, when state law prohibits suit by third party beneficiaries against the donor promisee. i.e Did the insured Plaintiffs have standing to sue Defendants who provided them with title insurance policies issued by Lawyers Title?

3. Whether the lower courts lacked subject – matter jurisdiction when, at the time of filing in State Court, the only federal "entity" was the Internal Revenue Service ("IRS")?

4. Where the IRS removed the case from State Court to Federal Court, and the United States was neither a named Defendant nor a removing Defendant, was the Court's judgment void for lack of subject matter jurisdiction and/or jurisdiction over the parties?

5. Was imposition of sanctions on Appellants an abuse of discretion?

6. Whether claimed creditors of a husband who obtain a constructive trust over the husband's interest in property 7 years after his death have priority over the wife's widow's probate rights, where the marriage occurred years before the constructive trust claims arose?

7. Whether Plaintiff Lawyers Title had standing to sue on behalf of its insureds, where it neither sought nor obtained relief in its own name?

PARTIES TO THE PROCEEDING

PETITIONERS

Robert E Butcher and Rosemary C Butcher, co-personal representatives of the Estate of Alexander M Butcher, deceased; Rosemary C. Butcher, an individual; Little Traverse Development Company, a Michigan Corporation, and HC Development Company, a Michigan Corporation. The Corporate entities, Little Traverse Development Company and HC Development Company, have no parent companies or non-wholly owned subsidiaries.

RESPONDENTS

Jobst WF Blachy; Lynn A Blachy; Davida Gale; Peter E Boss; Jeannette A. Boss; Kenneth W Gitlin; Roslyn E. Gitlin; Joseph H Jones; Barbara Ann Jones; TFC Agency, Incorporated, a Michigan Corporation; George F Malley; Barbara C Malley; Richard A Monash; Carol Monash; Charlotte R Monash; E Jerome McCarthy; Gunther S Meisse; Jeanne R Meisse; Irving Shanbom; Patricia Shanbom; Ronald W Mitchell; Patricia W Mitchell; Anthony J D'Errico; Ann T D'Errico; Northwestern Savings and Loan Association; Lawyers Title Insurance Corporation; Thomas G Allshouse; Sheryle K Allshouse; First Nationwide Bank; and United States of America, on behalf of the Internal Revenue Service

Respondent Lawyers Title Insurance Corporation is a principal subsidiary of a publicly owned corporation, LandAmerica Financial Group, Inc. No other respondent corporation has either a publicly owned parent or non-wholly owned subsidiary company.

TABLE OF CONTENTS

Page

QUESTIONED PRESENTED i

PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 5

ARGUMENT FOR GRANTING THE WRIT 9

1. The judicial power of the federal courts does not extend to suits against the Internal Revenue Service 9

2. The judgment is void because state law prohibits suits by the insured Plaintiffs against Defendants 11

3. There was no time-of-filing jurisdiction 13

4. The jurisdictional flaw could not be cured by dropping the IRS as a dispensable party 20

5. The panels are misinterpreting their own opinion which constitutes a taking of Appellant's property without due process of law 21

6. Suit was in the wrong court. The first suit was begun in state court on October 16, 1991 23

7. Rosemary owns the property 25

8. Lawyers Title had no standing 27

9. The sanctions are an abuse of discretion 28

CONCLUSION 28

APPENDIX 1a

Appendix A
Sixth Circuit Opinion 4/12/05 . . . . . 1a

Appendix B
District Court Order 6/18/03 . . . . . 17a

Appendix C
Sixth Circuit Opinion 7/21/00 . . . . . 21a

Appendix D
Internal Revenue Service, Notice of Removal
11/18/91 . . . . . 48a

Appendix E
Complaint 10/16/91 . . . . . 51a

Appendix F
District Court Final Order 12/14/98 . . . . . 78a

Appendix G
Bankruptcy Court Order Substituting Personal
Representatives for Deceased 2/11/94 . . . . . 81a

TABLE OF AUTHORITIES

Cases **Page**

Antoine v. Atlas Turner, Inc.,
66 F 3d 105 (6th Cir 1995) 19

Bender v. Williamsport Area School Dist,
106 S Ct 1326 (1986) 27

Blackmar v. Guerre,
342 U.S. 514 (1952) 10, 17

Blachy v. Butcher,
221 F 3d 846 (6th Cir 2000) 1

Carden v. Arkoma Associates,
110 S Ct 1015 (1990) 16

Conolly v Taylor,
2 Pet 556, 7 L Ed 518 (1829) 16, 18

Grupo Dataflux v. Atlas Global Group, L.P.,
124 S Ct 1920 (2004) 15

Hoyle v. Grange Life Assurance Association,
214 Mich 603 (1921) 19

In re Edwards,
962 F 2d 641(7th Cir 1992) 19

In re: Omegas Group,
17 F 3d 1443 (6th Cir 1994) 21, 22

Labry v. Internal Revenue Service,
940 F Supp 148 (ED LA 1996) 16, 17

Malone v. SCM Corp,
63 Mich App 11 (1975) 11

Michigan Hospital Service v. Sharpe,
339 Mich 357 (1954) 13

Mollan v. Torrance,
9 Wheat 537, 6 L Ed 154 (1824) 15

Nash v. New York Life Ins Co,
272 Mich 680 (1935) 13

Shamrock Oil & Gas Corp v. Sheets,
61 S Ct 868 (1941) 17

Stafford v. Briggs,
444 U.S. 527 10

Stefanac v. Cranbrook Educational Community,
435 Mich 155 (1990) 9

Strawbridge, et al v. Curtis, et al,
3 Cranch 267, 2 L Ed 435 (1806) 13

Steel Co. v. Citizens for a Better Environment,
118 S Ct 1003 (1998) 17, 18

Truck Lines v. Employers' Fire Ins. Co,
275 Mich 74 (1936) 12

United States v. City of New Britain,
317 U.S. 81, 74 S. Ct. 367, 98 L. Ed 520 (1954) . . 22

United States v Equitable Life Assurance Society of the United States, 384 U.S. 323, 86 S Ct 1561, 16 l Ed 2d 593 (1966) 22

Rules **Pages**

11 S Ct 449 16

28 USC § 1441 or § 1444 8

28 U.S.C. § 2410 . . . . . 6, 10

MCL 500.7301(a) 12

MCL 557.101 . . . . . 4, 8

MCL 559.194 . . . . . 5, 7, 11, 19

MCL 600.1405 12

FR Civ P 25c 27

Fed Civ P 60(b)(4) 1, 14, 4, 19, 22, 28

MCL 557.21 - Rights of Married Women Act 25

USCA Const Art 3, 2, cl 1 17

OPINIONS BELOW

The first opinion of the United States Court of Appeals for the Sixth Circuit is reported at 221 F 3d 896 (6th Cir 2000). A copy of the Opinion is included in App C at 21a . The Opinion of the District Court for the Western District of Michigan, Southern Division dated March 10, 1999, is published at 35 F Supp 2d 554. The District Court ordered entry of the Final Judgment on March 10, 1999.

The Opinion of the United States Court of Appeals for the Sixth Circuit affirming the denial of the Appellants' Motion for F Civ P 60(b)(4) relief, dated April 12, 2005, from which this appeal is taken, is included in App A at 1a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on April 12, 2005, (App A at 1a). The jurisdiction of this Court is invoked under 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const, Amended V
Takings Clause

No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const, Art III, Section 2.[1]

Section 2. [1] The judicial Power shall extend to all cases, in Law and Equity, * * * arising under this Constitution, the

Laws of the United States, * * * to Controversies to which the United States shall be a Party * * *.

Bankruptcy Code - Property of the Estate
11 USC 541(a)(1) and (7)

Section 541. Property of the Estate

(a) The commencement of a case under § 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * *

(7) Any interest in property that the estate acquires after the commencement of the case.

* * *

Bankruptcy Code - Exemption
11 USC § 522(b)(2)(B)

(b) Notwithstanding § 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection.

* * *

(B) Any interest in property in which the debtor had, immediately before the commencement of the case, an

interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable non-bankruptcy law.

Federal Substitution of Parties Rule
Fed R Civ P 25

(a) Death

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(b) Transfer of interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

* * *

Federal Relief from Judgment or Order Rule
Fed R Civ P 60(b)(1) and (4)

(c) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovery Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * *

(4) The judgment is void; * * * The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

* * *

Michigan Termination of Tenancy by Entirety Act
MCL 557.101, 557.102

Section 1. In all cases where husband and wife own any interest in land as tenants by the entirety, such tenancy by the entirety may be terminated by a conveyance from either one to the other of his or her interest in the land so held.

Section 2. This act shall be deemed to be declaratory of the common law as heretofore existing in this estate.

* * *

Michigan Condominium Act
MCL 559.194 - Title Insurance

Section 94. The developer shall furnish a purchaser buying a condominium unit from the developer a title insurance policy, in the amount of the purchase price, by a title insurance company licensed to do business in the state.

STATEMENT OF THE CASE

The basic issues are whether the lower federal courts had time-of-filing jurisdiction, whether the lower courts' judgments are void; whether state or federal law prohibited suit by Plaintiffs against the Butcher Defendants; and whether a constructive trust judicially created in December 1998 has priority over a widow's rights in her husband's 1991 probate estate?

The case involves a misconceived and misbegotten claim by Lawyers Title Insurance Corporation ("Lawyers Title") that it be relieved of its multiple liabilities on title insurance policies, issued by it over a 10 year period, in which it failed to check the public record back to a deed recorded on July 14, 1978, making it liable on all policies issued on condominium units after that date. Michigan has a 40-year marketable title act.

It is not clear how Lawyers Title is a party or is acting on behalf of insureds. It neither sought nor obtained relief for itself. It sought only a constructive trust for others. There is no such thing as a "subrogee" of a claim against an insurer without payment of the claim by the insurer.

The Butchers' jurisdictional argument, in their final brief below, dated October 18, 1999, Appeals No. 99-

1185/1492/1523, (4 ½ years before this Court's ruling in *Grupo Dataflux, infra*), was entitled: **"The District Court had no subject matter jurisdiction over this suit, for lack of a federal Defendant."** Plaintiffs argued, page 44 of Brief dated November 12, 1999, **"The United States, once named as a party under 28 USC § 2410, could properly remove this suit to the federal District Court pursuant to 28 USC § 1444."**

Of course, had counsel read those statutory sections before filing, they might have named the United States as a party Defendant, and they might have served the Attorney General. Sec 2410 would also appear to require Plaintiffs to seek a judicial sale, which they did not do.

Alexander and Rosemary Butcher, husband and wife, were married on January 23, 1960. They acquired the 17.83 acres of land at issue on July12, 1978. The deed to them was recorded on July 14, 1978. The Butchers had previously transferred a 36.65 acre parcel to Little Traverse Development Co ("LTDC"), a Michigan corporation owned solely by Alexander Butcher, ("Alexander"). The deed dated July 12, 1978, was a transfer back to the Butchers of 17.83 acres, out of those 36.65 acres.

LTDC set out to develop the 18.82 acres which it had retained, as part of phase II of the project, by building new condominiums thereon. Lawyers Title Insurance Corporation ("Lawyers Title") insured LTDC's title to the 18.82 acres, as well as the titles to the individual condominiums when developed and sold, without incident. Lawyers Title did not insure the July 12th conveyance to the Butchers, but was obviously aware that the 17.83 acres were not then being developed.

There was no error in the 1978 deed to the Butchers, contrary to the panel's holding. (App C at 24a). The first title examination error apparently occurred on April 29, 1981, when Lawyers Title issued its commitment no. 4478 to insure the construction loan on the units in question. The commitment referred back to the mortgage dated July 13, 1978, on which date LTDC was in fact the owner of record of the 17.83 acres. On August 18, 1978, Alexander specifically requested Arden Bawkey, Lawyer's Title agent, to check back to July 13, 1978, because that was the state of the title on July 13, 1978. Respondents offer no explanation as to how Lawyers Title could, in August of 1978, search the record back to July 13th and miss the deed from LTDC to the Butchers, which was recorded on July 14th, 1978.

After receiving that loan, LTDC built fifteen new condominium units on the 17.83 acres, still titled in the names of the Butchers, to complete phase II. The first deed to any insured Plaintiff appears to be dated October 22, 1981. Alexander Butcher formed HC Development Co ("HCDC") in 1984 and HCDC developed 9 condominium units, also on the 17.83 acres, as part of phase III. LTDC and HCDC apparently mistakenly believed they held title to the real property on which these 24 units were built. Rosemary Butcher ("Rosemary") was never a shareholder in either LTDC or HCDC. Lawyers Title insured title policies on many of the 24 units built on the 17.83 acres, guaranteeing to the unit purchasers the titles received from LTDC or HCDC.

MCL 559.194 requires condominium developers to furnish purchasers from the developer with a policy of title insurance in the amount of the purchase price. Over the years, for a fee, Lawyers Title probably issued 100 or more title commitments and/or policies, each of which indicated that title to the involved unit was in LTDC and/or HCDC,

rather than in the Butchers. Lawyers Title, or its agent, missed the deed recorded on July 14, 1978, in 100 or more public record searches in issuing its title work, because it only searches back to the last policy which it issued on a property, a procedure which guarantees that it will not detect its own prior mistakes.

Alexander was diagnosed with terminal cancer in approximately February 1991. He died on December 26, 1991. Rosemary filed a Chapter 7 petition in bankruptcy on March 1, 1991. In mid-1991, in an unrelated sequence of events, Lawyers Title was apprised by a new title agency of its multiple title commitment and title policy errors committed over the 10-year period.

Lawyers Title, in its own name and on behalf of its insureds, brought this suit in state court against LTDC, HCDC, and Alexander Butcher, individually, on October 16, 1991, seeking the alternate relief of a constructive trust over Alexander's interest, or, damages. The suit was removed (App D at 48a) to the district court by the Internal Revenue Service ("IRS"), which is a non-suable entity without removal power under either 28 USC § 1441 or § 1444. Alexander, unable to participate in extended legal proceedings, released his entireties interest in the property to his spouse by quit claim deed dated October 31, 1991, as permitted by MCL 557.101, terminating the entireties tenancy. An amended Complaint adding or substituting Rosemary as a Defendant was filed on November 10, 1998, seven years later. In the suit against Alexander, Alexander was substituted out of the case on February 11, 1994. (App G at 81a).

On October 21, 1993, Lawyers Title opened a probate estate for Alexander in Oakland County, Michigan, claiming to be a creditor. It filed a claim in its own name. No other

Plaintiff filed a claim in his or her name in the Probate Court, against the estate.

A final judgment was entered by the district judge on December 14, 1998 (App F at 78a), declaring Rosemary, who was not then a party to the action, to be the constructive trustee.

The 6th Circuit affirmed the district court's rulings as to the private defendants, but reversed his Judgment as to the Government. The suit was brought because the respondents were not joint creditors of Rosemary and Alexander. Plaintiffs could recover nothing in the bankruptcy proceeding, and so attempt to separate the entireties interest of Alexander and Rosemary. Petitioners argued that the insured respondents have no standing because each of them obtained a title policy, and each of them elected to avail himself of the policy benefits, rather than to rescind their agreements. See *Stefanac v. Cranbrook Educational Community*, 435 Mich 155, 176-177 (1990). The insureds were not and could not be injured.

ARGUMENT FOR GRANTING WRIT

Petitioners urge the Court to grant this Petition for Writ of Certiorari for the following reasons:

1. **The judicial power of the federal courts does not extend to suits against the Internal Revenue Service.** If the answer to question 1 was "yes," then this appeal could not be filed. It must be obvious that the answer to Question 1 is "no." Article III, Section 2 [1] of the U.S Constitution reads in pertinent part: "The judicial power shall extend ... to controversies to which the United States shall be a party ..." The United States was not a named party (App F).

In their final brief below, Plaintiffs claimed jurisdiction thusly:

> "Because the plaintiffs-appellees sought to enforce constructive trust on real property against which the U.S. Department of Treasury, Internal Revenue Service had filed tax liens, the IRS was named as a defendant, in accordance with 28 U.S.C. § 2410. Under 28 U.S.C. § 1444, the IRS removed the suit to the United States District Court for the Western District of Michigan, giving that court subject matter jurisdiction."

Of course, 28 U.S.C. § 2410 does not authorize the IRS to be sued, and 28 U.S.C. § 1444 does not authorize removal by the IRS. Plaintiffs made no other argument on jurisdiction. The United States argued:

> "... we also disagree with their [Appellants] contention (Br 34) that there is no basis for federal jurisdiction, because the plaintiffs improperly named the IRS rather than the United States as a defendant. To be sure, an executive department or one of its agencies may not be sued in its own name unless Congress has expressly conferred such authority (*Blackmar v. Guerre*, 342 U.S. 514-15 (1952)), and Congress has not authorized suits against the IRS. Nonetheless, the fact that the plaintiffs named as a defendant the IRS rather than the United States, is not fatal. In determining whether a suit is against the United States, the substance of the issues presented and the effect of the judgment sought are controlling. E.g. *Stafford v. Briggs, 444 U.S. 527, 542 n. 10.*"

The Government's argument boils down to a claim that the term "Internal Revenue Service" is synonymous with the words "The United States," permitting the Courts to "select" exceptions to the Time-of-Filing Rule.
Whether or not a citizen can sue the IRS directly should be a matter all citizens can understand.

2. **The judgment is void because state law prohibits suits by the insured Plaintiffs against Defendants**. The first reaction to a suit on a title defect, by the seller, would usually be: "But, I provided title insurance to the purchasers." What other purpose could title insurance have than to provide assurance to both buyer and seller that neither could sustain any financial loss should seller's title prove to have been defective at the time of sale? Who has ever heard of a title insurance company which admits that all the titles were void, and which admits that its agent did not check back to July 14, 1978, the date the sellers' deed was recorded, in subsequently issuing 100 or more title commitments and policies, but then sues the grantor and the grantees to attempt to avoid its liabilities?

State law required the "sellers" to provide title policies in connection with the "sales." MCL 559.194. Another Michigan law provides that the insured Plaintiffs, as third party beneficiaries of the contracts between the "sellers" and Lawyers Title to provide title insurance policies protecting the "buyers," are prohibited from suing the "sellers." MCL 690.1405. The leading case is *Malone v. SCM Corp*, 63 Mich App 11 (1975). Syllabus 1 reads:

> "1. Contracts - Third-Party Beneficiary - Donee Beneficiary - Common Law - Statutes - Promisor-Promissee

> A third-party donee beneficiary of an insurance contract is allowed by statute to maintain an action on the contract against the promisor even though at common law no contractual relationship was recognized, but neither the statute nor the common law permit an action by the third-party donee beneficiary against the promisee (MCL 600.1405)."

Title insurance is defined in MCL 500.7301(a) as:

> "(a) 'Title insurance' means the insuring, guaranteeing or indemnifying of designated owners of real estate or any interest therein against loss or damage which may result **by reason of the title being vested in a manner otherwise than as stated in the title insurance policy**, or by reason of the title being unmarketable, or by reason of the title being subject to liens, encumbrances or other matters adversely affecting the rights of use, enjoyment or disposition thereof, **and not excepted in the policy**, all in accordance with the terms of the title insurance policy approved as to substance and form, **or doing anything equivalent in substance to any of the foregoing in a manner designed to evade the provisions of this chapter**." (Emphasis supplied).

Lawyers Title has not paid the insured Plaintiffs. It has no cause of action against any Defendant. It claims to be acting as subrogee of its insureds. However, if the insured Plaintiffs are prohibited by law from suing Defendants, it follows that their "subrogee" is also barred from suing them. In Michigan, there is no right of subrogation where a party pays its own debt. "Subrogation rights follow and do not precede payment." *Truck Lines v. Employers' Fire Ins. Co*, 275 Mich 74 (1936).

> "Subrogation is allowed only in favor of one who under some duty or compulsion, legal or moral, pays the debt of another and not in favor of him who pays a debt in performance of his own covenants, for the right of subrogation never follows an actual primary liability." *Michigan Hospital Service v. Sharpe*, 339 Mich 357 (1954).

Lawyers Title was "willing to take the risk that title is as stated in the title insurance policy, page 45 of appellees' brief, when collecting the policy premiums. It was unwilling to pay its obligations when it became its turn to pay. Where the insured title was defective, Lawyers Title was immediately liable on the policies which it issued, which makes all other issues raised in the complaint moot. In *Nash v. New York Life Ins Co,* 272 Mich 680 (1935), syllabus 4, it is stated:

> "Upon the occurrence of a loss under an insurance policy the contractual status between the insured and insurer changes from a contingent liability on the part of the insurer to an absolute liability."

A title insurer can have no liability where it accurately searches the public record and correctly insures the record title. Lawyers Title claims that it has no liability, even where it makes serious mistakes. It cannot shift its absolute liability to Rosemary or Alexander. Counsel have a conflict of interest in representing the insurer and the unpaid insureds.

3. **There was no time-of-filing jurisdiction.** In *Strawbridge, et al v. Curtis, et al*, 3 Cranch 267, 2 L Ed 435 (1806), the report reads:

> "The court has considered this case, and is of the opinion that the jurisdiction cannot be supported.

> The words of the act of congress are, "where an alien is a party; or the suit is between a citizen of a state where the suit is brought, and a citizen of another state.
>
> The court understands these expressions to mean that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts."

The Rule 60(b) Motion and the appeal were filed because a panel of the Court of Appeals has held (App C at 34a) that Plaintiffs had no standing to sue the Government in this suit, so that the constructive trust judgment affirmed by the Court in this case against the Butcher Defendants/Appellants is void. That is, if Plaintiffs are found **not** to have standing to sue the Federal Government, no Federal Court had original jurisdiction to decide the matter as to the non-government Defendants.

The Court of Appeals appears to be misreading its own opinion.

The parties involved can be referred to in this Petition as: (1) Plaintiff Lawyers Title; (2) its insureds; (3) the Butcher Defendants; (4) the Internal Revenue Service ("IRS"); (5) and, the United States ("U.S"). At the time of filing the Complaint in the state court, October 16, 1991, the parties were (above) Plaintiffs (1) and (2) and Defendants (3) and (4). The U.S. was not a named party.

In *Grupo Dataflux v. Atlas Global Group, L.P.*, 124 S Ct 1920 (2004), this Court stated at page 1930:

> "We decline to endorse a new exception to a Time-of-Filing Rule that has a pedigree of almost two centuries. Uncertainty regarding the question of jurisdiction is particularly undesirable and collateral litigation on the point particularly wasteful. The stability provided by our Time-Tested Rule weighs heavily against the approval of any new deviation. The judgment of the Fifth Circuit is reversed."

At page 1924, this Court in *Dataflux* stated:

> "[1,2] It has long been the case that "the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Mollan v. Torrance*, 9 Wheat 537, 539, 6 L Ed 154 (1824). This time-of-filing rule is hornbook law (quite literally) taught to first year law students in any basic course on federal civil procedure."

* * *

We have adhered to the time-of-filing rule regardless of the costs it imposes.

* * *

At page 1930:

> Atlas and *Dataflux* have thus far litigated this case for more than 6 ½ years, including 3 ½ years over a conceded jurisdictional defect. Compared with the *one month* it took the Magistrate Judge to apply the

> time-of-filing rule and *Carden* when the jurisdictional problem was brought to her attention, this waste counsels strongly against any course that would impair the certainty of our jurisdictional rules and thereby encourage similar jurisdictional litigation.
>
> * * *
>
> Writing for the Court, Chief Justice Fuller adhered to the principle set forth in *Conolly v Taylor*, 2 Pet 556, 565, 7 L Ed 518 (1829), that "jurisdiction depending on the condition of the party is governed by that condition as it was at the commencement of the suit." "[J]urisdiction," he reasoned, "could no more be given ... by the amendment than if a citizen of Florida had sued another in that court and subsequently sought to give it jurisdiction by removing from the State." 138 U.S. at 708. 11 S Ct 449."

Under a previous "exception" to the Time-of-Filing Rule, Federal Courts had permitted "correction" of jurisdictionally defective diversity actions by the **dropping** of dispensable parties. *Dataflux*, pp 1921-1922. The IRS was the only named Federal Defendant, when the case was filed.

Plaintiffs attempted in this case to "correct" the Federal Court's jurisdiction by treating the United States as a party acting "on behalf of" the IRS, and, by treating the removal by the IRS as a "technical defect which did not preclude removal in this case" (App A at 24a, 25a) without dropping the (non-suable) IRS as a party.

In justification, the first panel cited *Labry v. Internal Revenue Service*, 940 F Supp 148, 149 (ED LA 1996). But that case was dismissed because the United States was not a

named party at the time of filing, and was not properly served. The *Labry* Court held that the United States, not the IRS, was the proper party (syllabus) and that:

> "Any ambiguities are construed against removal statute should be strictly construed in favor of remand." See also *Blackmar v. Guerre, et al*, 72 S Ct 410 (1952), and *Shamrock Oil & Gas Corp v. Sheets*, 61 S Ct 868 (1941).

Dataflux, decided in 2004, was cited to the Court of Appeals' second panel, but was not discussed in the opinion (App A) filed by that panel. At the time of filing of this action (October 1991) in the state court, there was admittedly no Federal Court jurisdiction because the IRS is a non-suable entity. The United States was never a named or substituted party. The IRS was not dismissed, or changed with another "party."

Syllabi 10 and 12 of *Steel Co. v. Citizens for a Better Environment*, 118 S Ct 1003 (1998) read:

> "10. For federal court to pronounce upon meaning or constitutionality of state or federal law when it has no jurisdiction to do so is, by very definition, for court to act **ultra vires**. USCA Const Art 3, d 2, cl 1.
>
> 12. Standing to sue is part of common understanding of what it takes to make justifiable case. USCA Const Art 3, d 2, cl 1."

In our brief to the Court of Appeals dated December 30, 2003, Appellants, pages 8-10, cited up to 10 Michigan cases holding:

> "(1) The rights of the respective parties are to be determined as of _____, the date upon which suit was commenced by the filing of the bill of complaint herein. 1 CJ P 1149."

On page 1926, this Court in *Dataflux* stated:

> "[4, 5] To our knowledge, the Court has never approved a deviation from the rule articulated by Chief Justice Marshall in 1829 that "[w]here there is *no* change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit." *Conolly*, 2 Pet, at 556, 7 L Ed 518 (emphasis added). Unless the Court is to manufacture a brand-new exception to the time-of-filing rule, dismissal for lack of subject matter jurisdiction is the only option available in this case.
>
> * * *
>
> But allowing a citizenship change to cure the jurisdictional defect that existed at the time of filing would contravene the principle articulated by Chief Justice Marshall in *Conolly*. We decline to do today what the Court has refused to do for the past 175 years."

The insured Plaintiffs, the IRS, Lawyers Title, and Alexander or his estate were parties throughout the entire case.

All this Court seems to be saying in *Dataflux* and *Steel Co* is that where a Federal Court has subject matter jurisdiction at the time of filing the Complaint, that jurisdiction cannot be contested after final judgment on appeal. Where the Court never acquired jurisdiction upon filing, its Judgment in the

action is void and can be challenged at any time. A judgment is void under Rule 60(b)(4) "if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law. *Antoine v. Atlas Turner, Inc.*, 66 F 3d 105, 108 (6th Cir 1995), quoting *In re Edwards*, 962 F 2d 641, 644 (7th Cir 1992) (citation omitted).

No Plaintiff had a claim of title against the Government through LTDC because LTDC itself had no valid claim of title. Whenever LTDC "conveyed" to a Plaintiff, it did not own the property. In *Holden Co v. Tait Realty Co*, 216 Mich 633 (1921), syllabus 3 reads:

> "3. Where a vendor is unable to perform because it has no title to the land contracted to be conveyed, the purchaser's only remedy is by an action at law for damages for breach of the contract."

In *Hoyle v. Grange Life Assurance Association*, 214 Mich 603, 607 (1921), where the insurance agent negligently advised that payment would reinstate the policy, the Court stated:

> "Sharp was the agent of the company to carry out its orders and get a health certificate. His neglect to do this was the neglect of the company. After receiving the premiums and being advised as to what Sharp had done, it would be manifestly unjust to permit the company to plead its own neglect, or the neglect of its agent, in defense of the claim."

Of course, the development corporations provided title insurance policies, as required by MCL 559.194, to cover any damages to each "purchaser from them." Lawyers Title

cannot plead the 100 or more negligences of its agent as a defense to paying the insureds.

So, if there are to be no new exceptions to the Time-of-Filing Rule, and the removal statutes are to be "strictly construed," as held by this Court, the matter should have been dismissed by the Court of Appeals. Under Michigan's third party beneficiary statute, neither the State Court nor the District Court had jurisdiction over any Plaintiff. They had no standing to sue Defendants.

4. **The jurisdictional flaw could not be cured by dropping the IRS as a dispensable party.** No diversity jurisdiction was claimed in this matter. While the IRS was certainly "dispensable," to drop it as a party, the diversity "cure" in *Dataflux*, would simply leave the Lawyers Title Plaintiffs and the Butcher Defendants as parties in a State Court action, which is probably where it belonged because the U.S was not a named party. The District Court Judge attempted to cure the jurisdictional flaw by dropping the IRS from sight and adding the U.S. as a co-party but, by definition, these actions could not meet the Time-of-Filing requirement. The United States was not added as a party. The IRS was never dropped as a party. The Attorney General was never served.

The jurisdictional flaw became more apparent when the first *Blachy* panel ruled, (App C at 34a), that the Lawyers Title Plaintiffs had no "choate" cause of action against the Government, and thus, had no standing to sue it. All claim of Federal Court jurisdiction disappeared with that lack of standing ruling. Neither the IRS nor the U.S. could be sued in the priority action filed against the Government because, at the time of filing, Lawyers Title, et al, had not acquired any

interest in the property upon which the Government claimed a lien. The Appeals Court's first panel said:

> (App B at 34a):
> "Furthermore, in *In re: Omegas Group*, 17 F 3d 1443 (6th Cir 1994), this court held that "because a constructive trust, unlike an express trust, is a remedy, it does not exist until a plaintiff obtains a judicial decision finding him to be entitled to a judgment "impressing" defendant's property or assets with a constructive trust.
>
> * * *
>
> Based on the reasoning in *Dishman* and *In re Omegas Group*, the plaintiffs' constructive trust claim [against the United States] only became choate when the district court granted judgment **in 1998.** (Emphasis supplied).
>
> * * *
>
> Although we agree that the equitable remedy as between the Butchers and the plaintiffs is to impose a constructive trust, the analysis is different with respect to the IRS. The IRS properly perfected its interest by filing a tax lien against the Butchers' property."

Plaintiffs' Federal Court case against Defendants disappeared because their actions against the Government were not choate when the Complaint was filed.

5. **The panels are misinterpreting their own opinion which constitutes a taking of Appellant's property without due process of law.**

The Fifth Amendment to the United States Constitution reads, in pertinent part:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law. * * *."

The District Judge and the Appeals panel misunderstand the thrust of the Fed Civ P 60(b) Motion at issue. Plaintiffs believe that the panel's Opinion dated July 21, 2000, is **favorable as to them**. Movants/Appellants believe that the same Order/Opinion holds that the District Court and the Court of Appeals lacked both subject matter jurisdiction and personal jurisdiction over the parties because, (App. C, at page 34a), the first panel of the Court of Appeals, had ruled:

> "[11] Only competing claims that meet the federal standard of "choateness" before the federal tax lien arises can prime a federal tax lien. See *United States v Equitable Life Assurance Society of the United States*, 384 U.S. 323 328 86 S Ct 1561, 16 l Ed 2d 593 (1966) (holding that a federal tax lien was entitled to priority over a mortgagee's inchoate claim for attorney's fees). A state-created lien is choate only when "there is nothing more to be done," i.e., "when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *United States v. City of New Britain*, 317 U.S. 81, 84, 74 S. Ct. 367, 98 L. Ed 520 (1954).
>
> * * *
>
> [p 30a]:
> Based on the reasoning in *Dishman* and *In re Omegas Group*, the plaintiffs' constructive trust claim only

> became choate when the district court granted judgment in 1998.

Since the Plaintiffs' constructive trust claims did not, at the earliest, become "choate" until December, 1998, when the District Court first granted Judgment, 7 years after Alexander's death, there was then nothing in existence owned by Alexander upon which a constructive trust could be impressed. Rosemary's widow's and entireties interests claimed all the property Alexander owned as of December 26, 1991, the date of his death, as provided by Michigan law.

6. **Suit was in the wrong court. The first suit was begun in state court on October 16, 1991.** Alexander's deed to Rosemary was dated October 31, 1991, terminating the entireties tenancy. Alexander died on December 26, 1991. The Court of Appeals concluded (App. C, p 40a) that, as of November 1, 1991:

> "In short, Alexander had a separate interest in the 17.83 acres that did not become part of Rosemary's bankruptcy estate either at the time she filed her bankruptcy petition or when she acquired Alexander's interest through his quitclaim deed."

Citing FR Civ P 25, the Court of Appeals and the District Court held that Alexander's death did not extinguish Plaintiffs' claims against his "separate interest." (App C, p 44a). But even those courts and Lawyers Title all recognized that Alexander's separate interest in the 24 condominium units had to go into Alexander's probate estate. Lawyers Title **opened** the estate and also filed a claim against it, in its own name, which claim has been denied. No insured Plaintiff filed a claim against Alexander's estate. The bankruptcy

judge ordered Appellants to be substituted into this suit, as Alexander's Personal Representatives. (App G).

Thus, Lawyers Title filed two separate actions in Michigan Courts seeking a constructive trust over Alexander's considerable property. The District Judge rejected Appellants' argument that Alexander's death "extinguished" Plaintiffs' claims, and held in 1998 that Alexander still had a separate interest in the condominiums.

The Probate Court unquestionably had "exclusive legal and equitable jurisdiction" over Alexander's estate. MCL 700.1302(a) provides:

> "Sec 1302. The court has exclusive legal and equitable jurisdiction of all of the following:
> (a) A matter that relates to the settlement of a deceased individual's estate, whether testate or intestate, who was at the time of death domiciled in the county or was at the time of death domiciled out of state leaving an estate within the county to be administered, including, but not limited to, all of the following proceedings:
> (i) The internal affairs of the estate.
> (ii) Estate administration, settlement, and distribution.
> (iii) Declaration of rights that involve an estate, devisee, heir, or fiduciary.
> (iv) Construction of a will.
> (v) Determination of heirs.
> (vi) Determination of death of an accident or disaster victim under section 1208."

Michigan's "Rights of Married Women Act provides:

> "557.21. Sec 1. (1) If a woman acquires real or personal property before marriage or becomes entitled to or acquires, after marriage, real or personal property through gift, grant, inheritance, devise, or other manner, that property is and shall remain the property of the woman and be a part of the woman's estate. She may contract with respect to the property, sell, transfer, mortgage, convey, devise, or bequeath the property in the same manner and with the same effect as if she were unmarried. The property shall not be liable for the debts, obligations, or engagements of any other person, including the woman's husband, except as provided in this act."

When Alexander died in 1991, the pending suit become moot.

7. **Rosemary owns the property.** In their efforts to trash Michigan real property, entireties property, and probate laws, Lawyers Title, et al, apparently forgot one thing ... Alexander was a married man. He and Rosemary had 4 children. The couple were married on January 23, 1960. From that date to this, Rosemary had inchoate and choate rights in property owned by Alexander, be he alive or dead. Since common law days, special provisions have been included in state laws for the benefit of spouses and children. For example, Rosemary is the sole beneficiary under Alexander's will. She acquired all of his property interests immediately upon his death, some 7 years before a constructive trust was "impressed" by the District Court. In addition, she has a right of election; a right to homestead allowance; a right to a reasonable family allowance; a right to exemption; to miscellaneous household items and automobiles; **and a priority right** to fiduciary compensation

and expenses in this matter. No federal court has jurisdiction over such matters.

When Alexander died, his real property interests descended immediately to Rosemary. Her widow's rights became choate. Plaintiffs sued Rosemary to obtain the interest she received from Alexander in the deed of October 30, 1991. They failed to sue her for the property she acquired through his death. Alexander could not, by conveying his interest to Rosemary, deprive her of her widow's rights, as Plaintiffs and the Court of Appeals seem to think.

Observe that when Rosemary obtained her interest in Alexander's property **cum marriage,** they did not yet own the 17.83 acres, nor was Alexander's interest subject to a constructive trust claim. Rosemary's marital interests arose long before the claimed "interests" of the Plaintiffs.

Most title insurance companies are aware of the concept of and provisions for dower, election, family allowances, etc, in probate laws. A miscellaneous excerpt from MLP, dower, reads:

> During the life of her husband, a wife has an inchoate right of dower in his lands, which, while it is not an estate or title or interest in lands, is a valuable right in which the wife is protected. Inchoate dower is but a contingent interest, which does not become vested until the husband's death, and, during the husband's lifetime, it gives the wife no right to the possession of, or income from, her husband's property. Inchoate dower is entitledto protection as is choate dower itself, **and no act of the husband can prejudice or defeat**

the dower rights of a resident wife." (Emphasis supplied).

No insured filed a claim against Alexander's estate. The Probate Court is the only Court which has jurisdiction to rule upon inclusion of, or distribution from, the assets of a decedent in his estate administration, i.e. "declaration of rights that involve an estate, devisee, heir, or fiduciary."

The lower courts (App C at 45a) somehow found that FR Civ P 25c (transfer of interest) had the effect, when Rosemary received the deed of October 31, 1991, from Alexander, of canceling **Rosemary's marital rights**, surely a strange reasoning, even though Rosemary acquired her widow's interests in Alexander's property long before suit was filed in 1991.

Upon that transfer of interest, Plaintiff's claims against Alexander in the Federal Court were extinguished. The validity of the deed to Rosemary was never challenged. Even Plaintiffs concede that, after Alexander's death, they had to proceed in the Probate Court. Lawyers Title opened an estate for him and filed a claim as a creditor.

8. **Lawyers Title had no standing**. Plaintiffs and Lawyers Title's standing was challenged by Appellants at every opportunity in the lower courts, as was the jurisdiction of those courts. The United States' first affirmative defense was that the IRS had no capacity to sue or be sued. Either the lower courts had time-of-filing jurisdiction, or they did not.

The writer was derided by the District Judge for arguing that Lawyers Title could not not have standing to sue for constructive trust relief for the other Plaintiffs, but see *Bender v. Williamsport Area School Dist*, 106 S Ct 1326 (1986).

Why go to law school if one can bring suit in federal courts on behalf of others?

9. **The sanctions are an abuse of discretion.** The District Judge assessed sanctions against Appellants for bringing the Rule 60(b) Motion, in which they argued the first panel's judgment to be void. The second panel of the Court of Appeals also ordered sanctions, but did not address the standing or jurisdictional issues. Lawyers Title seeks sanctions in excess of $40,000 in this case.

To the best of the writer's knowledge and belief, Appellants' submissions were not frivolous. Certainly, they were not prepared or filed for vexatious purposes. Lawyers Title instituted suit and has expended "hundreds of thousands of dollars" (their words) in an attempt to divest a bankrupt widow of ownership of property bought by her and her spouse with their own money.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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DATED: July 11, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

03-2079

[Filed April 12, 2005]

Jobst Blachy, et al., Plaintiff-Appellees,	)
v.	)
Robert Butcher, et al., Defendant-Appellants.	)

OPINION

RICHARD MILLS, District Judge.

Rosemary Butcher's Rule 60(b) motion for relief below was patently without merit.

Her appeal from the district court's denial was equally baseless.

The sanctions ordered by the district court were clearly proper and are affirmed.

In addition. Appellees' motion for sanctions on appeal under Rule 38 and § 1297 is granted.

I. HISTORY[1]

A. Factual history

Alexander Butcher ("Alexander") and his wife Rosemary Butcher ("Rosemary") sought to develop resort condominiums in northern Michigan through Little Traverse Development Company ("LTDC"), a Michigan corporation owned solely by Alexander. On June 30, 1978, Cedar Cove, a Michigan limited partnership in which Alexander was a partner, conveyed four parcels of land, consisting of approximately 100 acres in Little Traverse Township, to Alexander and Rosemary for the price of $640,000. By warranty, deed dated July 6, 1978, Mr. and Mrs. Butcher conveyed two of these four parcels (40.81 acres in total) to LTDC. Both the June 30 and July 6 deeds were recorded on July 12, 1978. That same day, Alexander signed a warranty deed in his capacity, as president of LTDC, conveying the unmortgaged portion of the property, consisting of 17.83 acres, back to Mr. and Mrs. Butcher as tenants by the entirety. This deed was recorded on July 14, 1978.

At Alexander's request, Lawyers Title issued a title commitment to LTDC for the full 40.81 acres on July 18. 1978. Lawyers Title failed to discover the 17.83 acre conveyance from LTDC back to Mr. and Mrs. Butcher. As a result, the title commitment erroneously listed LTDC as the

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[1] The history set forth in this Opinion is largely taken from the Court's previous opinion in this matter. *See Blachy v. Butcher*, 221 F.3d 896 (6th Cir. 2000), *cert denied*, 532 U.S. 994 (2001).

owner of all 40.81 acres--including the 17.83 acres that had been conveyed to Mr. and Mrs. Butcher.

On November 1, 1978, Alexander, on behalf of LTDC, executed a master deed creating Harbor Cove Phase II on the entire 40.81 acres. From 1981 to 1984, LTDC constructed and sold condominiums on portions of the acreage that included the 17.83 acres. Nine of those condominiums were sold to the plaintiffs or their predecessors-in-interest.

On May 8, 1984, Alexander formed H.C. Development Company ("HCDC"). He was the majority stockholder, president, and a director of this new corporation. In late October of 1984, Alexander signed a warranty deed on behalf of LTDC, purporting to convey 12.60 of the 17.83 acres to HCDC. Alexander, as president of HCDC, then signed a master deed creating Harbor Cove Phase III on the 12.60 acres. He granted Northwestern Savings and Loan Association a mortgage on this acreage to secure a construction loan. After Lawyers Title issued a title commitment for the transaction, HCDC constructed condominiums on the development. HCDC began selling the condominiums in December of 1985. Three of these condominiums were sold to the plaintiffs or their predecessors-in-interest.

In the deeds conveying the condominiums to the plaintiffs, Alexander, acting as president of both LTDC and HCDC. represented that one or the other of those entities held title to the particular condominium being sold. He also stated under oath on several occasions that LTDC was the owner of the Phase II property, and that HCDC was the owner of the Phase III property.

In August of 1988, the Internal Revenue Service ("IRS") issued an assessment against Mr. and Mrs. Butcher for

approximately $61,000 in unpaid federal income taxes that arose from the taxable year 1986. On September 9, 1988. the United States, acting on behalf of the IRS, filed a tax lien[2] against Mr. and Mrs. Butcher's property seeking to attach Rosemary's and Alexander interest in the 17.83 acres.

On March 1, 1991, Rosemary filed for bankruptcy. The condominium owners--who had been paying the property taxes on the 17.83 acres over the years--subsequently learned of the July 12, 1978, conveyance from LTDC to Mr. and Mrs. Butcher. On September 17, 1991, Rosemary amended her bankruptcy schedules to claim ownership of the 17.83 acres. Prior to that date, Mr. and Mrs. Butcher had taken no action to claim title to any portion of the property. Alexander quitclaimed his interest in the 17.83 acres to Rosemary on October 31, 1991. Alexander died in December 1991.

B. Procedural history

Rosemary filed her Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Michigan. Seven and a half months later, Lawyers Title and the condominium owners to whom Lawyers Title issued title insurance policies sued Alexander, LTDC, HCDC, and the IRS in Emmet County Circuit Court, Michigan. The plaintiffs did not sue Rosemary because she was under the protection of the bankruptcy court.

On November 18, 1991, the IRS removed the state court action to the United States District Court for the Western District of Michigan. The district court stayed the Western District case while the plaintiffs pursued an adversary

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[2] The unpaid balance of the tax liability, now exceeds $150,000.

proceeding in Rosemary's bankruptcy case. In both actions, the plaintiffs sought a constructive trust.

Subsequent to Alexander's death in late 1991, Rosemary and Robert Butcher (Rosemary's brother-in-law and co-personal representative of Alexander's estate) moved the district court to dismiss the plaintiff's case because Alexander's estate had not been substituted as a party following his death. The plaintiffs responded by moving to transfer venue to the bankruptcy court. On August 16, 1993, the district court denied the motion to dismiss, holding that the order staying the district court action pending the adversary proceeding in the bankruptcy court tolled the time limit for substituting the estate of Alexander into the suit under Rule 25(a)(1) of the Federal Rules of Civil Procedure. The district court also granted the plaintiffs' motion to transfer venue to the Bankruptcy Court for the Eastern District of Michigan.

The plaintiffs' Western District case and Rosemary's bankruptcy proceeding were consolidated on November 18, 1993, in the bankruptcy court. On February 11, 1994, the bankruptcy court substituted Rosemary and Robert Butcher[3] for Alexander.

In late November of 1994, the bankruptcy court granted the plaintiffs' motion for summary judgment and imposed a constructive trust over the 17.83 acres for the condominium owners' benefit. The bankruptcy court also concluded that the constructive trust related back to 1978, thus predating and superseding the IRS's 1988 tax lien.

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[3] When jointly referring to Rosemary and Robert Butcher, the Court will hereafter refer to them as "the Butchers."

The defendants appealed the bankruptcy court's ruling to the United States District Court for the Eastern District of Michigan. On July 31. 1995, the bankruptcy court's award of summary judgment to the plaintiffs was reversed by the district court. The district court's decision was based upon the case of *XL/Datacomp. Inc. v. Wilson (In re Omegas Group Inc.)*, 16 F.3d 144.3 (6th Cir. 1994). in which this court held that a bankruptcy court may not impose a constructive trust over estate property *See Id.* at 1452-5.3. Because of *In re Omegas Group* the district court concluded that the proper remedy would be to have the debt declared nondischargeable. The case was then remanded to the bankruptcy court.

The bankruptcy court transferred the plaintiff's claim for a constructive trust over Rosemary's nonbankruptcy interest–the interest she acquired from Alexander--back to the Western District of Michigan. It also lifted the automatic stay in order to permit the plaintiffs to name Rosemary as a defendant and to add a fraudulent conveyance claim.

After the case was transferred back to the Western District, the parties filed cross-motions for summary, judgment. The district court granted the plaintiffs' motion, concluding that a constructive trust was appropriate. The district court further ruled that the Butchers' arguments relating to standing, jurisdiction, and the statute of limitations were meritless. The court held that a constructive trust arose on July 12, 1978, the date LTDC conveyed the 17.83 acres to Rosemary and Alexander. Because the district court retroactively applied the constructive trust as of that date, it concluded that the 1988 federal tax lien was subordinate to the plaintiffs' interest in the property and therefore ineffective.

The Butchers filed a motion for reconsideration, arguing that a constructive trust should not have been imposed over

Rosemary's nonbankruptcy interest because she had not been served with a summons and a copy of the amended complaint. The district court acknowledged this oversight and ordered the plaintiffs to serve Rosemary with a summons and a copy of the amended complaint within fourteen days. It further ordered Rosemary to file a response, setting forth her reasons why a constructive trust should not be imposed over her nonbankruptcy interest in the 17.83 acres. Additionally, the United States filed a motion to clarify and reconsider, arguing that the district court appeared to be placing the constructive trust over Rosemary's bankruptcy and nonbankruptcy interests alike. The Butchers filed a supplemental motion for reconsideration arguing that summary judgment should be denied, but acknowledging that Rosemary's attorney had received a summons and a copy of the amended complaint pursuant to an agreement with opposing counsel. Rosemary then filed a response, setting forth her opposition to the constructive trust.

Other than finding that the constructive trust was overbroad, the district court rejected all of the arguments in the motion for reconsideration, the supplemental motion for reconsideration, and the Government's motion to clarify. Because the scope of the constructive trust was unclear, the district court declared in a supplemental order that the scope of the constructive trust would be limited to the nonbankruptcy portion of Rosemary's overall interest in the 17.83 acres. The Butchers filed another motion to reconsider, and the district court denied it. The Butchers appealed.

On appeal, this Court held that the district court had jurisdiction over the nonbankruptcy portion of Rosemary's interest in the 17.83 acres; that the interest in the property Rosemary received from Alexander in October 1991 was not part of her bankruptcy estate; that neither Alexander's

quitclaim deed nor his death extinguished the constructive trust claim; that the owners and Lawyers Title had standing to bring the constructive trust claim; that removal to federal court was proper despite the fact that the owners and Lawyers Title had named the IRS as a defendant rather than the Government; that the constructive trust claim was not time-barred; and that summary judgment was proper as to Rosemary. *See Blachy v. Butcher* 221 F.3d at 905-10. The Court upheld the imposition of the constructive trust on Rosemary's nonbankruptcy interest in the 17.83 acres but found that the constructive trust did not defeat the federal tax lien. *See id.* at 903-06. After unsuccessfully petitioning this Court for a rehearing, Rosemary filed an unsuccessful petition for writ of certiorari. *See Blachv v. Butcher*, 532 U.S. 994, 121 S.Ct. 1653, 149 L.Ed.2d 636 (2001).

On January 3, 2003, Rosemary moved the district court to reconsider pursuant to Federal Rule of Civil Procedure 60(b)(4), (5), and (6). She alleged that the district court lacked subject matter and personal jurisdiction. She requested relief from the district court's December 16, 1998, summary judgment order and its March 10, 1999, motion for reconsideration. The district court denied Rosemary's motion because it was untimely and the arguments she made would not have changed the case's outcome. The district court also held that Rosemary's motion was an improper attempt to get a lower court to alter a higher court's ruling. Lastly, the district court noted that all of the arguments Rosemary, presented in her motion had been previously raised and rejected by itself and this Court.

Rosemary moved for reconsideration of the order denying her motion for Rule 60(b) relief. She also argued that Alexander had not conveyed his entireties interest in the property to her when he quitclaimed in October 1991. The

district court denied Rosemary's motion for the reasons stated in its March 17, 2003, order. Lawyers Title moved for sanctions and the district court awarded it the attorneys' fees and expenses incurred in responding to Rosemary's meritless motion. The Butchers timely appealed.

STANDARD OF REVIEW

This Court reviews a district court's denial of a Rule 60(b) motion for an abuse of discretion. *See Hood v. Hood*, 59 F.3d 40.42 (6th Cir.1995). An abuse of discretion occurs if there is "a definite and firm conviction that the trial court committed a clear error of judgment." *Cincinnati Ins. Co. v. Bvers*. 151 F.3d 574. 578-79 (6th Cir. 1998) (quoting *Logan v. Dayton Hudson* Corp., 05 *E.2cl* 789, 790 (6th Cir. 1989)).

ANALYSIS

A. The Butchers' Appeal of the Rule 60(b) Motion

Rule 60(b)(6) is properly invoked only in "unusual and extreme situations where principles of equity *mandate* relief." *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990). District courts can allow Rule 60(b) motions only for the following reasons:

> 1) mistake, inadvertence, surprise, or excusable neglect; 2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); 3) fraud,.., misrepresentation, or other misconduct of an adverse party; 4) the judgment is void; 5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the

> judgment should have prospective application; or 6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed.R.Civ.P. 60(b).

Rosemary sought reconsideration pursuant to Rule 60(b)(4), (5), and (6), alleging that the district court lacked removal jurisdiction; no court had jurisdiction over the acreage because it was still being held in tenancy by the entirety, at the time suit was originally filed; Lawyers Title defrauded the court by making various factual misstatements; the Michigan state court had exclusive jurisdiction because Alexander's interest in the acreage was part of his probate estate; Lawyer's Title lacked standing or a right of subrogation; and Appellees' counsel, the United States, and the bankruptcy trustee defrauded the court and Rosemary by arranging for the federal tax lien to be paid from the proceeds of the sale of the 17.83 acres held in the bankruptcy estate.[4]

These claims, like all claims under Rule 60(b)(4), (5), and (6), must be filed "within a reasonable time." *Id.* The flexible nature of his time frame is not unlimited. In fact, the Court has held that a motion filed pursuant to Rule 60(b)(4) and (6) is untimely where more than three years have passed between

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[4] The Butchers' brief to this Court also alleges a claim based on the Fifth Amendment. In violation of Federal Rule of Appellate Procedure 28(a)(9)(A), the brief does not contain any contention or citation to authority with respect to a Fifth Amendment claim. Thus, the Court will not consider the Butchers' Fifth Amendment claim.

the time the motion was filed and judgment was entered. *See Ohio Cas. Ins. Co. v. Pulliam*, No. 96-6522, 1999 WL 455336, *2 (6th Cir. June 23, 1999).

The district court entered summary judgment against Rosemary. on December 14, 1998, and entered its final order on March 10, 1999. Rosemary did not file her Rule 60(b) motion until January 3, 2003. Rosemary argues that this was not an unreasonable length of time given that the bankruptcy portion of the proceedings did not end until October 6, 2002. However, Rosemary's Rule 60(b) motion did not seek reconsideration of the bankruptcy court's order; rather, her motion was aimed at the district court's 1998 and 1999 orders. Because the district court's orders were the subject of Rosemary's motion, their entry dates are the relevant marks by which to measure the timeliness of Rosemary's motion. More than three years passed between the time the district court entered its orders and the time Rosemary filed her Rule 60(b) motion. This is an unreasonable delay. *See Pulliam*,

1999 WL 455336, at *2. Thus, the district court properly denied Rosemary's Rule 60(b) motion as untimely.[5]

In addition to being untimely, Rosemary's claims are meritless. As this Court explained on the previous appeal, the district court had subject rnatter jurisdiction, removal was appropriate, and Lawyer's Title had standing to sue pursuant to the subrogation Clause in its title insurance policy. See Blachv, 221 F.3d at 906-I0. These conclusions barred the district court from granting relief for these claims. *See United States v. Real Property Numbered as 249 S. Main Street*, 906 F.Supp. 1155, 1159 (S.D. Ohio 1995) ("A district court.., does not have jurisdiction to alter an appellate ruling where the appellate court has already considered and rejected the basis for relief cited in the Rule 60(b) motion."). Moreover, the Butchers' Rule 60(b) motion did not argue that the case was improperly removed or that the Michigan state court had exclusive jurisdiction. This Court does not generally hear issues raised for the first time on appeal. *See Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 143 (6th Cir. 1997). The

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[5] As an alternate basis for its decision, the district court denied Rosemary's motion because the facts did not warrant relief from judgment and because the motion impermissibly sought to rehash the underlying judgment. These are both valid reasons to deny a Rule 60(b) motion. *See Browder v. Dir., Dep't of Corr.*, 434 U.S. 257, 263 n. 7 (1978) (appeal from an order denying a Rule 60(b) motion does not bring up for review the underlying judgment disposing of the complaint); *Feathers v. Chevron U.S.A.. Inc.*, 141 F.3d 264, 268 (6th Cir.1998) (appellate review of a denied Rule 60(b) motion is limited to "whether one of the specified circumstances exists in which [an appellant] is entitled to reopen the merits of his underlying claims."); *Lewis v. Alexander*, 987 F.2d 392, 396 (6th Cir.1993) (a Rule 60(b) motion must be denied if there are no facts warranting relief).

Butchers do not set forth any reason for the Court to depart from the general rule.

Finally, the Butchers cannot establish fraud upon the court. Fraud uponthe court is conduct: 1) on the part of an officer of the court; 2) that is directed to the judicial machinery itself; 3) that is intentionally false, wilfully blind to the truth, or is in reckless disregard for the truth; 4) that is a positive averment or a concealment when one is under a duty to disclose; 5) that deceives the court. *See Demianiuk v. Petrovskv*, 10 F.3d 338,348 (6th Cir.1993). The Butchers do not discuss any of these elements or apply them to the facts of the case. Even if they had, any fraud related to the sale and distribution of assets in 2001 and 2002 could not have invalidated the district court's 1998 and 1999 orders.

B. Sanctions

The district court sanctioned Rosemary and her counsel, Robert Butcher, jointly pursuant to Rule 11 and 28 U.S.C. § 1927. This Court reviews the district court's imposition of these sanctions for abuse of discretion.. *See Tropf v. Fid. Nat'l Title Ins. Co.*, 289 F.3d 929, 930 (6tn Cir. 2002) (discussing Rule 11); *Ridder v. City of Springfield*, 109 F.3d 288,-298 (6th Cir. 1997) (citation omitted) (discussing§ 1927).

In this Circuit, "the test for imposition of Rule 11 sanctions is whether the individual's conduct was reasonable under the circumstances." *See Tropf*, 289 F.3d 939 (quotation omitted); *see also Pittman v. Michigan Corrections Organization*, 2005 WL 65516, *3 (6th Cir.Jan. 7, 2005). Rule 11(b) provides that:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,–
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

See Fed.R.Civ.P. 11(b).

After "notice and a reasonable opportunity" to respond are given, a court may sanction a party, attorney, or law firm. that has violated or is responsible for violating Rule 1 l(b). *See* Fed.R.Civ.P. 1 l(c).

Here. the district court sanctioned Rosemary because her Rule 60(b) motion was "objectively unreasonable." Such a characterization is patently sound. After all, Rosemary's claims had been rejected in some form or fashion by the district court and the Sixth Circuit alike.

Thus, the district court correctly determined that Rosemary did not have a good faith basis for filing her Rule 60(b) motion. Sanctions were, therefore, appropriate under Rule 11 (b)(2).

The district court also found that sanctions were appropriate under § 1927. Section 1927 : provides that any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927.

As the foregoing section of this opinion attests, Rosemary's Rule 60(b) motion was objectively meritless. Its untimeliness and baselessness were obvious. Similarly, there can be no doubt that the Appellants' litigation strategy vexatiously and unreasonably multiplied these proceedings. From the time this case entered the federal court system in 1991 through the present date, Rosemary has not obtained a single successful judgment. She and her counsel, Robert Butcher, have contested issues they had no business contesting and, in the course of their conduct, earned the sanctions the district court imposed under Rule 11 and § 1927.

The Butchers' conduct persists even on appeal. Upon a separately filed motion or notice from a court, Federal Rule of Appellate Procedure 38 allows a court to award "just damages and single or double costs to the appellee." Fed.R.App.P. 38. Sanctions are appropriate under Rule 38 where litigation is frivolous, where "the result is obvious or where the appellant's argument is wholly without merit." *See Pieper v. Am. Arbitration Ass'n*, 336 F.3d 458, 465 (6th Cir. 2003).

The Appellees move the Court to sanction the Butchers pursuant to Rule 38 and § 1927 and the Court has a difficult time imagining a case where sanctions would be more just. The result of the Butchers' appeal was obvious since their arguments were either untimely, could not be raised for the first time to this Court, or were objectively meritless. The Butchers must bear the consequences of their actions and be deterred from further folly.

CONCLUSION

We AFFIRM the district court's decision. Furthermore, we GRANT the Appellees' motion for sanctions on appeal under Rule 38 and § 1927. Appellees shall file an affidavit within fifteen days of this order setting forth the hourly rates of its counsel and the number of hours spent in defending this appeal.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

No. 1:91-CV-979

[Filed June 18, 2003]

JOBST W.F. BLACHY, et al.,
Plaintiffs,

v.

ROBERT BUTCHER, et al.,
Defendants.

MEMORANDUM ORDER

OPINION BY: GORDON J. QUIST

The Court has before it: (1) Defendant Rosemary Butcher's Motion for Reconsideration of the Court's March 17, 2003, Order Denying Her Motion for Rule 60(b) Relief ("Rosemary"); and (2) the affidavit of Lawyers Title Insurance Company's counsel pursuant to the Court's April 7, 2003, Order granting Lawyers Title's motion for Rule 11 sanctions.

The Court has read Rosemary's motion for reconsideration and will deny it for the reasons set forth in its March 17, 2003, Order denying Rosemary's motion for relief pursuant to Fed. R. Civ. P.60(b).

The Court has also reviewed the affidavit filed by Lawyers Title's counsel as well as Rosemarys objections to the affidavit. To the extent Rosemary objects to an award of attorney fees and costs, those objections are overruled, because the Court has already determined that Lawyers Title is entitled to an award of reasonable attorney fees and costs pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927. In addition, Rosemary's argument that the Court should refrain from awarding attorney fees until the conclusion of this proceeding (which Rosemary apparently intends to appeal once again) is rejected. With regard to the amount requested, Rosemary asserts that it is unreasonable, but does not give any specific bases for that objection. Nonetheless, the Court will conduct its own review to determine the reasonableness of the requested award.

In determining whether an award of attorney fees is reasonable, a court should consider the attorney's hourly rate and number of hours incurred in responding to the offending party's conduct. Bodenhamer Bldg. Corp. Corp. v. Architectural Research Corp., 989 F.2d 213, 221 (6th Cir. 1993). The product of these two figures results in a lodestar. Id. However, the Sixth Circuit has made clear that unlike attorney fee awards in other contexts, deterrence, rather than compensation, is the principal goal of Rule 11 sanctions. Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor, 875 F.2d 1224, 1229 (6th Cir. 1989). Thus, reasonable fees and actual fees are not necessarily synonymous. INVST Fin. Group. Inc. v. Chem-Nuclear Sys., Inc., 815 F.2d 391, 404 (6th Cir. 1987). Moreover, "even when the offended party's

actual expenditures appear reasonable, a district court may determine in its discretion that a smaller amount should be awarded as a sanction in consideration of the financial resources of the offending attorney." Jackson, 875 F.2d at 1230.

The affidavit submitted by Lawyers Title's counsel states that two partners, James Smith and Jeffrey Raphelson, and one associate, Thomas Bruetsch, performed work in responding to Rosemary's motion. (Raphelson Aff. P7.) Mr. Smith's time was billed at a rate of $295-$325 per hour, Mr. Raphelson's time was billed at a rate of $ 200-$ 250 per hour, and Mr. Bruetsch's time was billed at a rate of $ 150 per hour. (*Id.*) Lawyers Title's counsel spent a total of 36.667 hours on the matter, including .5 hour by Mr. Smith, 17.417 hours by Mr. Raphelson, and 18.75 hours by Mr. Bruetsch. (*Id.* PP 7, 8.)

Having reviewed the descriptive entries for work performed by Lawyers Title's counsel, the Court concludes that the hours spent in responding to Rosemary's extensive motion and brief were reasonable. However, while the hourly rates of Lawyers Title's counsel are probably within the market range for comparable legal services in the Detroit, Michigan, area, the Court concludes that hourly rates of $ 200 for partner work and $150 for associate work would be adequate to serve Rule 11's policy of deterrence while providing adequate compensation to Lawyers Title for having to respond to Rosemary's frivolous motion. Applying those rates to the hours incurred produces a total award of $ 6,395.90 ($100 for Mr. Smith; $3,483.40 for Mr. Raphelson; and $2,812.50 for Mr. Bruetsch).[1] Therefore,

---

[1] While neither Rosemary nor her counsel have argued lack of financial resources to pay the amount requested by Lawyers Title,

IT IS HEREBY ORDERED that Defendant Rosemary Butcher's Motion for Reconsideration of the Court's Order Dated March 17, 2003 (docket no. 118) is DENIED.

IT IS FURTHER ORDERED that Plaintiff Lawyers Title Insurance Company shall recover from Defendant Rosemary Butcher and her counsel, jointly, $6,395.90 for attorney fees incurred in responding to Defendant Rosemary Butcher's frivolous motion for Rule 60(b) relief. The award shall be paid within thirty (30) days from the date of this Order.

Dated: JUN 18 2003

GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

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the Court notes that Rosemary has filed bankruptcy and therefore is unlikely to have significant funds available to pay a large fee award.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 99-1185/1492/1523

[Filed July 21 2000]

Jobst W.F. Blachy, et al., Plaintiffs-Appellees,	)
v.	)
ROBERT E. BUTCHER and ROSEMARY BUTCHER, co-personal representatives of the estate of Alexander Michael Butcher, deceased; ROSEMARY BUTCHER, individually; LITTLE TRAVERSE DEVELOPMENT COMPANY, a Michigan corporation; H.C. DEVELOPMENT COMPANY, a Michigan corporation, Defendants-Appellants (99-1185/99-1492),	)
UNITED STATES OF AMERICA, on behalf of the Internal Revenue Service, Defendant-Appellant	)

(99-1523).)
_____)

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids. No. 91-00979 - Gordon J. Quist, District Judge.

OPINION

RONALD LEE GILMAN, Circuit Judge. Even a *diabolical* bar examiner would be reluctant to impose this case's complex mixture of subject matter jurisdiction, fraud, real estate, marital property, bankruptcy, tax liens, contributory negligence, equitable remedies, and civil procedure upon hapless law school graduates. Because reality often marches in where creators of hypotheticals fear to tread, however, we are the *hapless" appellate court judges obliged to struggle with this twisted tale of true-life conflict.

The essence of this complicated case is that twelve condominium owners and their title insurance company, Lawyers Title Insurance Corporation, have filed suit against Rosemary C. Butcher, the representatives of the estate of her late husband Alexander M. Butcher, Little Traverse Development Company (LTDC), H.C. Development

Company (HCDC), and the Internal Revenue Service (IRS), claiming that the condominium owners should be declared the legal titleholders of certain property previously owned by Alexander and Rosemary Butcher as tenants by the entirety. After eight years of proceedings in multiple courts, the United States District Court for the Western District of Michigan granted the plaintiffs' motion for summary judgment, imposing a constructive trust upon the disputed property owned by the Butchers and later purchased by the

condominium owners. The Butchers, LTDC, and HCDC (collectively the Butcher defendants) have appealed, challenging the imposition of the constructive trust. Another key issue on appeal, brought by the United States on behalf of the IRS, challenges the portion of the district court's decision holding that a federal tax lien encumbering the Butchers' property is subordinate to the plaintiffs' constructive trust. For the reasons set forth below, we REVERSE the judgment of the district court regarding the status of the IRS's tax lien, but AFFIRM its judgment in all other respects.

I. BACKGROUND

A. Factual history

Alexander and Rosemary Butcher sought to develop resort condominiums in northern Michigan through LTDC, a Michigan corporation owned solely by Alexander. On June 30, 1978, Cedar Cove, a Michigan limited partnership in which Alexander was a partner, conveyed four parcels of land, consisting of approximately 100 acres in Little Traverse Township, to Alexander and Rosemary for the price of $640,000. By warranty deed dated July 6, 1978, the Butchers conveyed two of these four parcels, consisting of 40.81 acres, to LTDC. Both the June 30 and July 6 deeds were recorded on July 12, 1978. That same day, Alexander signed a warranty deed in his capacity as president of LTDC, conveying the umortgaged portion of the property, consisting of 17.83 acres, back to the Butchers as tenants by the entirety. This deed was recorded on July 14, 1978.

At Alexander's request, Lawyers Title issued a title commitment to LTDC for the full 40.81 acres on July 18, 1978. Lawyers Title failed to discover the 17.83 acre conveyance from LTDC back to the Butchers, presumably

because the July 12, 1978 warranty deed had been recorded only four days earlier. Alexander also failed to inform Lawyers Title of its existence. As a result, the title commitment erroneously listed LTDC as the owner of all 40.81 acres, which included the 17.83 acres no longer in LTDC's name.

Thereafter, Alexander, on behalf of LTDC, executed a master deed dated November 1, 1978 that created Harbor Cove Phase II on the entire 40.81 acres. From 1981 to 1984, LTDC constructed and sold condominiums on portions of the acreage that included the 17.83 acres in dispute, nine of which were sold to the plaintiffs or their predecessors-in-interest.

On May 8, 1984, Alexander formed HCDC. He was the majority stockholder, president, and a director of this new corporation. In late October of 1984, Alexander signed a warranty deed on behalf of LTDC, purporting to convey 12.60 of the 17.83 acres to HCDC. Alexander, as president of HCDC, then signed a master deed creating Harbor Cove Phase III on the 12.60 acres. He also granted a mortgage to Northwestern Savings and Loan Association on this acreage in order to secure a construction loan. After Lawyers Title issued a title commitment for the transaction, HCDC constructed condominiums on the development. It began selling the condominiums in December of 1985, three of which were sold to the plaintiffs or their predecessors-in-interest.

In the deeds conveying the condominiums to the plaintiffs, Alexander, acting as president of both LTDC and HCDC, represented that one or the other of those entities held title to the particular condominium being sold. He also stated under oath on several occasions that LTDC was the owner of the

Phase II property and that HCDC was the owner of the Phase III property.

In August of 1988, the IRS issued an assessment against the Butchers for approximately $61,000 in unpaid federal income taxes that arose from the taxable year 1986. On September 9, 1988, the United States, acting on behalf of the IRS, filed a tax lien against the Butchers' property, seeking to attach Rosemary's and Alexander's interest in the 17.83 acres. The unpaid balance of the tax liability now exceeds $150,000.

On March 1, 1991, Rosemary filed for bankruptcy. Soon thereafter, the condominium owners learned of the July 12, 1978 conveyance from LTDC to the Butchers. On September 17, 1991, Rosemary amended her bankruptcy schedules to claim ownership of the 1% 83 acres. Prior to that date, the Butchers had taken no action to claim title to any portion of the property. In fact, it was the plaintiffs, not the. Butchers, who have paid the property taxes on the 17.83 acres over the years. Alexander quitclaimed his interest in the 17.83 acres to Rosemary on October 31, 1991. He died in December of that year.

B. Procedural history

Rosemary filed her Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Michigan. Seven and a half months later, Lawyers title and the condominium owners to whom Lawyers Title issued title insurance policies sued Alexander, LTDC, HCDC, and the IRS in Emmet County Circuit Court. The plaintiffs did not sue Rosemary because she was under the protection of the bankruptcy court.

After being served with the complaint, the IRS removed the state court action to the United States District Court for the Western District of Michigan on November 18, 1991. The district court entered an order staying the Western District action while the plaintiffs pursued an adversary proceeding in Rosemary's bankruptcy case. In both actions, the plaintiffs sought the imposition of a constructive trust.

Subsequent to Alexander's death in late 1991, the Butcher defendants moved to dismiss the district court action because Alexander's estate had not been substituted as a party following his death. The plaintiffs responded by moving to transfer venue to the bankruptcy court. On August 16, 1993, the district court denied the Butcher defendants' motion to dismiss, holding that the order staying the district court action pending the adversary proceeding in the bankruptcy court tolled the time limit for substituting the estate of Alexander into the suit under Rule 25(a)(1) of the Federal Rules of Civil Procedure. (This part of the district court's order is not being contested on appeal.) The district court also granted the plaintiffs' motion to transfer venue to the Bankruptcy Court for the Eastern District of Michigan in the same order.

Both the plaintiffs' Western District action and Rosemary's bankruptcy proceeding were consolidated on November 18, 1993 in the bankruptcy court. On February 11, 1994, the bankruptcy court issued an order substituting the representatives of Alexander's estate, being Rosemary and her brother-in-law Robert E. Butcher, for Alexander.

In late November of 1994, the bankruptcy court granted the plaintiffs' motion for summary judgment, imposing a constructive trust over the 17.83 acres for the benefit of the condominium owners. The bankruptcy court also concluded

that the constructive trust related back to 1978, thus predating the IRS's tax lien that arose against the Butchers in 1988.

The defendants appealed the bankruptcy court's ruling to the United States District Court for the Eastern District of Michigan. On July 31, 1995, the bankruptcy court's award of summary judgment to the plaintiffs was reversed by the district court. The district court's decision was based upon the case of *XL/Datacomp, Inc. v. Wilson (In re Omegas Group, Inc.)*, 16 F.3d 1443 (6th Cir. 1994), in which this court held that a bankruptcy court may not impose a constructive trust over estate property. *See id.* at 1452-53. Because of *In re Omegas Group, the* district court concluded that the proper remedy would be to have the debt declared nondischargeable. The case was then remanded to the bankruptcy court.

Upon remand, the bankruptcy court, still believing that a constructive trust was the appropriate remedy, entered an order transferring the plaintiffs' claim for a constructive trust over Rosemary's nonbankruptcy interest (being the interest that she acquired from Alexander) back to the United States District Court for the Western District of Michigan. It also lifted the automatic stay, which prohibits actions against debtors in bankruptcy, in order to permit the plaintiffs to add Rosemary as a defendant and to add a fraudulent conveyance count against the Butchers.

After the case was transferred back to the Western District, the plaintiffs in fact moved to amend their complaint to add Rosemary as a defendant and to add a fraudulent conveyance count against the Butchers. The motion was granted. All of the parties then filed cross-motions for summary judgment. Concluding that the facts of the case compelled the imposition of a constructive trust, the district court granted the plaintiffs' motion. It ruled that the Butcher

defendants' arguments relating to standing, jurisdiction, and the statute of limitations were without merit. The district court also held that the constructive trust arose as of July 12, 1978, which was the date of the conveyance of the 17.83 acres by LTDC to Rosemary and Alexander. Because the district court retroactively applied the constructive trust as of that date, it concluded that the 1988 federal tax lien was subordinate to the plaintiffs' interest in the property and therefore ineffective.

The Butcher defendants filed a motion for reconsideration, arguing that a constructive trust should not have been imposed over Rosemary's interest (Rosemary's interest refers solely to her nonbankruptcy interest unless otherwise stated) because she had not been served with a summons and a copy of the mended complaint. Acknowledging this oversight, the district court ordered the plaintiffs toserve Rosemary with a summons and a copy of the amended complaint within fourteen days. It further ordered that Rosemary file a response, setting forth her reasons why a constructive trust should not be imposed over her interest in the 17.83 acres.

The United States also filed a motion to clarify and reconsider, arguing that the district court appeared to be placing the constructive trust over both Rosemary's bankruptcy and nonbankruptcy interests. A supplemental motion for reconsideration was then filed by the Butcher defendants, arguing that summary judgment should be denied, but acknowledging that Rosemary's attorney had received a summons and a copy of the amended complaint pursuant to an agreement with opposing counsel. Shortly thereafter, Rosemary filed a twenty-one page response, setting forth her reasons why a constructive trust should not be imposed.

The arguments made in the Butcher defendants' motion for reconsideration, their supplemental motion for

reconsideration, and the United States's motion to clarify were all rejected, except for the argument that the constructive trust was overbroad. Because the scope of the constructive trust was unclear in its initial order, the district court declared in a supplemental order that the scope of the constructive trust would be limited to the nonbankruptcy portion of Rosemary's overall interest in the 17.83 acres. The Butcher defendants then filed another motion to reconsider, which was denied. This appeal followed.

II. ANALYSIS

A. Standard of review

The Butcher defendants and the IRS are appealing various legal issues relating to the district court's grant of summary judgment on the plaintiffs.' constructive trust claim. This court reviews de novo a district court's grant of summary judgment. *See Smith v. Ameritech,* 129 F.3d 857, 863 (6th Cir. 1997).

B. The district court's imposition of the constructive trust was proper

One of the Butcher defendants' primary arguments is that the district court erred when it imposed a constructive trust over Rosemary's interest in the 17.83 acres. The plaintiffs counter that a constructive trust was necessary in order to prevent Rosemary from being unjustly enriched by her and Alexander's inequitable conduct.

Under Michigan law, the imposition of a constructive trust is appropriate in order "to do equity or to prevent unjust enrichment .... Hence, such a trust may be imposed when property has been obtained through fraud, misrepresentation,

concealment,.., or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property .... " *Kammer Asphalt Paving Co. v. East China Township Schs.*, 504 N.W.2d 635,641-42 (Mich. 1993) (internal quotation marks and citations omitted).

Based on the following sequence of events, the district court imposed a constructive trust in order to prevent the Butchers from being unjustly enriched at the plaintiffs' expense: On July 12, 1978, the Butchers recorded warranty deeds conveying the 17.83 acres from Cedar Cove to the Butchers and from the Butchers to LTDC. That same day, Alexander, in his capacity as president of LTDC, conveyed the 17.83 acres back to himself and Rosemary as tenants by the entirety. Thereafter, the Butchers, through their corporate entities, Secured approval from the State of Michigan for the necessary building permits, obtained financing for the projects through various loans and mortgages, and sold the finished condominium units to the plaintiffs or their predecessors in title. During the process of obtaining the proper permits and financing, the Butchers, both individually and through LTDC and HCDC, represented to the State of Michigan, to the lenders, and to the purchasers that the 17.83 acres was owned by either LTDC or HCDC. Because the Butchers did not claim any individual ownership interest in the 17.83 acres until after Rosemary had filed her bankruptcy petition, the condominium owners had no reason to doubt the soundness of their insured legal title to the acreage in question. They also paid the property taxes in the intervening years.

The Butchers argue that the district court did not find that they had committed fraud. A constructive trust, however, may be imposed without a finding of fraud. *See McCreary v. Shields,* 52 N.W.2d 853, 856 (Mich. 1952) (holding that a constructive trust is imposed in order to prevent injustice, and

that such a trust may be imposed when the circumstances show that it would be inequitable for the holder of legal title to retain the property). Because the Butchers participated or acquiesced in actions certifying LTDC's and HCDC's ownership of the 17.83 acres when they knew that they had retained legal title to the property as individuals, and because the Butchers stood silent while the plaintiffs paid the property taxes on the 17.83 acres, the district court's imposition of the constructive trust over Rosemary's interest was proper. *See Kren v. Rubin,* 61 N.W.2d 9, 11 (Mich. 1953) (observing that a very strong justification for imposing a constructive trust arises when a party allows another to pay his property taxes).

The Butchers also argue that they were under no obligation to expressly inform the plaintiffs about the July 12, 1978 conveyance from LTDC to the Butchers. Assuming this to be true, they were still under an obligation not to deceive and mislead the plaintiffs by warranting that LTDC and HCDC owned the property and by allowing the plaintiffs to pay the property taxes.

Finally, the Butchers argue that imposing a constructive trust is inappropriate because the plaintiffs' remedy is against Lawyers Title for negligently failing to discover the July 12, 1978 conveyance back to the Butchers. The Butchers' misleading and deceptive conduct, however, will not be rewarded or justified simply because Lawyers Title failed to catch it. *See Grzesick v. Cepela,* 603 N.W.2d 809, 815 (Mich. Ct. App. 1999) ("A comparative negligence defense is inapplicable to a claim of intentional tort"); *Law Offices of Steven D. Smith, P.C. v. Borg-Warner Sec. Corp.,* 993 P.2d 436, 444 (Alaska 1999) ("Mere negligence of the plaintiff is not a defense to an intentional tort. n) (internal quotation marks omitted). Although the facts may not conclusively demonstrate fraud, Alexander's and Rosemary's failure to

inform Lawyers Title of the July 12, 1978 conveyance back to themselves just before Alexander requested Lawyers Title to issue a title commitment to LTDC that included the 17.83 acres is a strong indication of fraud. Consequently, we affirm the district court's decision to impose a constructive trust.

C. The constructive trust does not defeat the IRS's tax lien

The district court determined that the constructive trust should be retroactive to July 12, 1978, the date of the deed from LTDC to the Butchers. Accordingly, the district court held that the Butchers did not have an interest in the property to which the 1988 tax lien could attach, It thus concluded that the tax liens were subordinate to the plaintiffs' beneficial interest in the property arising from the constructive trust. The United States appeals this ruling, arguing that any constructive trust claim that the plaintiffs may have had does not affect the validity of the federal tax lien.

Title 26 U.S.C. § 6321 provides that "[i]f any person liable to pay any tax neglects or refuses to pay the sameafter demand, the amount.., shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." "The threshold question . . . in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had property or rights to property to which the tax lien could attach." *Aquiline v. United States,* 363 U.S. 509, 512 (1960) (internal quotation marks omitted). "Although state law creates legal interests and rights in property, federal law determines whether and to what extent those interests will be taxed." *United States v. Irvine,* 511 U.S. 224, 238 (1994).

Under Michigan law, a "constructive trust is strictly not a trust at all, but merely a remedy administered in certain fraudulent breaches of trusts." *Soo Sand & Gravel Co. v. M. SuUivan Dredging Co., 244 N.W. 138, 140 (Mich. 1932).* Accordingly, a constructive trust does not arise until a judicial decision imposes such a trust under Michigan law. The federal tax lien in the present case arose in 1988. Because the constructive trust was not judicially imposed over the 17.83 acres until a decade later, the government argues that the federal tax lien should be given precedence over the plaintiffs' interest.

Even if Michigan law allows the doctrine of "relation back" to give the beneficiary of a constructive trust priority over Private intervening interests, this would not be determinative as to the IRS. The priority of a federal tax lien against competing claims is governed by federal law. *See United States v. Dishman Independent Oil, Inc.*, 46 F.3d 523, 526 (6th Cir. 1995) ("It is undisputed that when a federal lien is involved, the relative priority between competing liens is a question of federal law determined by the principle 'the first in time is the first in right.'"). Federal law, however, makes no provision for the subordination of a tax lien through the use of the "relation back" doctrine. *See id.* at 527; *United States v. Security Trust & Savings Bank of San Diego,* 340 U.S. 47, 50 (1950) (holding that a property right that comes into existence by court action, such as a judgment lien, does not relate back to some earlier date to destroy the priority of a federal tax lien); *Dryev. United States,* U.S., 120 S. Ct. 474, 478 (1999) (holding that a state disclaimer law, which applies retroactively and treats the disclaimant as having predeceased the decedent, does not defeat a federal tax lien that has already attached to the disclaimant's property).

Only competing claims that meet the federal standard of "choateness" before the federal tax lien arises can prime a federal tax lien. *See United States v. Equitable Life Assurance Society of the United States,* 384 U.S. 323, 328 (1966) (holding that a federal tax lien was entitled to priority over a mortgagee's inchoate claim for attorney's fees). A state-created lien is choate only when "there is nothing more to be done," i.e., "when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *United States v. City of New Britain,* 347 U.S. 81, 84 (1954). In *Dishman, the* issue was "whether a state attachment lien has priority over a federal tax lien if the property subject to the liens was attached prior to the time the federal tax lien was filed, although final judgment on the attachment lien was not handed down until after the federal tax lien was filed." *Dishman,* 46 F.3d at 526. This court held that the state attachment lien was subordinate to the federal tax lien because the state lien only became choate upon the state judgment, which came after the federal tax lien was filed. *See id.* at 526-27. Furthermore, in *In re Omegas Group,* 16 F.3d 1443 (6th Cir. 1994), this court held that "because a constructive trust, unlike an express trust, is a remedy, it does not exist until a plaintiff obtains a judicial decision finding him to be entitled to a judgment "impressing" defendant's property or assets with a constructive trust." *Id.* at 1451.

Based on the reasoning in *Dishman and In re Omegas Group, the* plaintiffs' constructive trust claim only became choate when the district court granted judgment in 1998. The district court, however, relied upon the following three cases for its holding that a constructive trust can be retroactively applied to defeat a federal tax lien: *FTC v. Crittenden,* 823 F. Supp. 699 (C.D. Cal. 1993), *aft'd,* 19 F.3d 26 (9th Cir. 1994), *Reliance Insurance Co. v. Brown,* 40 B.R. 214 (W.D. Mo. 1984), *TMG II v. United States,* 778 F. Supp. 37

(D.D.C. 1991), *aff d in part and rev'd in part,* 1 F.3d 36 (D.C. Cir. 1993). We find these cases unpersuasive because they fail to explain how a constructive trust that is judicially imposed after the filing of a federal tax lien can retroactively meet the federal standard of "choateness," thus priming the lien. Furthermore, these cases are inconsistent with this court's decisions in *Dishman and In re Omegas Group. The* district court's only mention *of In re Omegas Group was in a* footnote supporting the proposition that a district court may impose a constructive trust, and it did not mention *Dishman* at all.

Although we agree that the equitable remedy as between the Butchers and the plaintiffs is to impose a constructive trust, the analysis is different with respect to the IRS. The IRS properly perfected its interest by filing a tax lien against the Butchers' property. On the other hand, the plaintiffs, directly or indirectly, exercised a lack of diligence in failing to discover the July 12, 1978 conveyance back to the Butchers. It was this lack of diligence that contributed to the present legal quagmire. Consequently, from an equity standpoint, we believe that it would be unfair to the IRS, a party without "fault," to prime the IRS's choate tax lien by retroactively applying a constructive trust in favor of the plaintiffs. If the condominium owners wish to recover for the monetary loss caused by the tax lien, they might have a remedy against Lawyers Title.

In summary, a judicially-created equitable remedy cannot be applied retroactively to defeat a choate federal tax lien. Also, as between the plaintiffs and the IRS, the equities favor the IRS. We therefore reverse the ruling of the district court on this issue.

D. The district court for the Western District of Michigan had jurisdiction over the nonbankruptcy portion of Rosemary's interest in the 17.83 acres, and neither Alexander's quitclaim deed nor his subsequent death extinguished the plaintiffs' constructive trust claim

1. *The interest that Rosemary received from Alexander's quitclaim deed was not part of her bankruptcy estate*

The Butchers argue that because Rosemary and Alexander owned the 17.83 acres as tenants by the entirety, all of the property became part of her bankruptcy estate when she filed her bankruptcy petition. Alternatively, they claim that Rosemary became the sole owner of the property when Alexander quitclaimed his interest in the property to her shortly before his death. Either way, they argue that the district court in the Western District of Michigan lacked jurisdiction over this dispute because exclusive jurisdiction over the entire property resided in the bankruptcy court for the Eastern District of Michigan. We disagree.

As to the Butchers' tenants-by-the-entirety argument, there is no doubt that Rosemary's tenancy interest in the 17.83 acres became part of her bankruptcy estate when she filed for bankruptcy on March 1, 1991. *See* 11 U.S.C. § 541(a)(1) (providing that the property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case"). Moreover, in *In re Grosslight,* 757 F.2d 773 (6th Cir. 1985), this court discussed Michigan's tenants-by-the-entirety concept in relation to federal bankruptcy law as follows:

> Michigan is among the minority of states retaining the common law tenancy by the entirety. Tenants by the entirety, who must be husband and wife, hold under a

> single title with right of survivorship. Neither husband nor wife acting alone can alienate any interest in the property, nor can the creditors of one levy upon the property; but their joint creditors can reach entireties property .... It is now established law that [11 U.S.C. § 541(a)] brings entireties property into the bankruptcy estate.

Id. at 775 (citations omitted).

With respect to the existence of separate interests in entireties property, this court has made the following ruling regarding Tennessee's similar property regime."

> Under Tennessee law, Arango does not, as an individual, have a present possessory interest in entireties property. Instead, Arango and his wife, as a unit which is separate and apart from them as individuals, have a present possessory interest in entireties property. The practical effect of Tennessee's legal construct is that Arango has the right to use and enjoy entireties property, at least until his wife may piedecease him or he and his wife, together, convey their present possessor), interest, despite the legal belief that Arango does not have a present possessory interest. Under the Bankruptcy Code, on the other hand, Arango does have a present possessory interest in entireties property which is considered part of his individual bankruptcy estate under section 541(a)(1).

Arango v. Third National Bank (In re Arango), 992 F.2d 611, 614 (6th Cir. 1993). By recognizing an interest in entireties property that is part of a debtor's bankruptcy estate, *In re Arango* implicitly recognized the corresponding interest that would not be part of the debtor's estate.

To shed further light on the issue of how the bankruptcy of one spouse affects entireties property, a leading bankruptcy treatise provides that a "trustee can sell [a debtor's interest in entireties property], subject to the spouse's right of first refusal. The non-filing spouse receives his or her share of the proceeds and the trustee keeps the balance for distribution." Daniel R. Cowans, Bankruptcy Law and Practice § 7.5, at 290 (7th ed. 1998); *Finneran v. Associates Fin. Servs. (In re Blair),* 151 B.R. 849, 851 (Bankr. S.D. Ohio 1992), *aff'd,* 33 F.3d 54 (6th Cir. 1994) (observing that "[d]ivision of entireties equity between the estate and the debtor's spouse or co-owner is supported by a majority of courts. "); 11 U.S.C. § 3630), (11) (providing that "the trustee shall distribute to the debtor's spouse" his or her portion of the Proceeds from the sale of tenancy-by-the-entirety property).

In arguing that there is no separate property interest that can be reached by creditors of only one of the entireties tenants, the Butchers rely heavily upon the case of *Craft v. United States,* 140 F.3d 638 (6th Cir. 1998). The *Craft case* is distinguishable, however, because the property at issue was not part of a bankruptcy estate. Consequently, this court did not consider how a bankruptcy filing might affect the respective interests in entireties property of a debtor and non-debtor spouse. In contrast, this was precisely the situation in both *Grosslight* and *Arango.*

The Butchers' other theory concerning the Western District of Michigan's alleged lack of jurisdiction relates to Alexander's quitclaiming his portion of the 17.83 acres to Rosemary on October 31, 1991, which was seven months after Rosemary had filed for bankruptcy. This conveyance terminated the tenancy by the entirety. *See* M.C.L. § 557.101 (providing that a conveyance of an entireties interest by one spouse to the other terminates the entireties interes0. Because

Alexander did not quitclaim his interest in the 17.83 acres until after 180 days had passed since the filing of Rosemary's bankruptcy petition, however, Rosemary possessed this interest outside of bankruptcy. *See generally,* 11 U.S.C. § 541(a)(5)(A) (providing that if a debtor receives property within 180 days of her bankruptcy petition, then the interest becomes property of the estate). At this point, Rosemary had an interest in the 17.83 acres that was under the control of the bankruptcy trustee, and she had an interest in the 17.83 acres that was held outside of bankruptcy.

There was no merger of these separate interests. In fact, during the bankruptcy proceedings, the Butchers argued that Rosemary held a separate, nonbankruptcy interest in the 17.83 acres. The Butchers, however, are not judicially estopped from now taking a different position because there is no evidence that the Butchers were successful with this argument, which is a necessary element of judicial estoppel. *See Teledyne Industries, Inc. v. NLRB,* 911 F.2d 1214, 121718 (6th Cir. 1990) (observing that a party is not bound by an unsuccessful argument in a prior proceeding).

Consequently, after the bankruptcy court transferred the constructive trust count to the district court in the Western District of Michigan and lifted the automatic stay, the district court had jurisdiction to adjudicate the constructive trust issue with respect to Rosemary's nonbankruptcy interest in the 17.83 acres. The Butchers' argument that the district court did not have jurisdiction to impose a constructive trust on property that Rosemary acquired postpetition because the constructive trust was based upon the plaintiffs' prepetition claims ignores the fact that the trust was imposed by a district court, not a bankruptcy court, that the automatic stay had been lifted, and that the constructive trust only applies to Rosemary's nonbankruptcy interest.

The Butchers further argue that the plaintiffs are not entitled to the benefit of a constructive trust over Rosemary's interest because she is not liable for the actions of Alexander, LTDC, and HCDC. This argument is unavailing because Rosemary stands in the shoes of Alexauder with respect to her nonbankruptcy interest in the 17.83 acres, arid if Alexander was not entitled to retain his interest in the property, then that interest is subject to a constructive trust despite the fact that Rosemary now owns it. *See Florida East Coast Railway Company v. Patterson,* 593 So. 2d 575, 577 (Fla. Dist. Ct. App. 1992) ("[O]ne who accepts a quitclaim deed is conclusively presumed to have agreed to take the title subject to all risks as to defects") (citation and internal quotation marks omitted).

Moreover, even if Rosemary's interest in the property was not burdened by the actions of Alexander, a constructive trust could still be imposed over her interest because she herself does not have clean hands. Rosemary acquiesced in the July 12, 1978 conveyance from LTDC to herself and her husband, she did not inform the plaintiffs of the July 12 conveyance, and she allowed the plaintiffs to pay the taxes on the property without disclosing that she and Alexander held legal title. The fact that Rosemary did not play as big a role as Alexander in deceiving and misleading the plaintiffs is not determinative.

In short, Alexander had a separate interest in the 17.83 acres that did not become part of Rosemary's bankruptcy estate either at the time she filed her bankruptcy petition or when she acquired Alexander's interest through his quitclaim deed. Accordingly, we affirm the district court's ruling on this issue.

2. *The bankruptcy court can share its jurisdiction*

In a related argument, the Butchers claim that because 28 U.S.C. § 1334(e) gives the bankruptcy court exclusive jurisdiction over the debtor's property, that the district court in the Western District of Michigan lacked jurisdiction to rule on the constructive trust claim. The plaintiffs counter that the U.S.C. § 1444. This section allows for the removal of any case where suit is brought against the United States regarding one of its liens. Even though the Butcher defendants are correct that the IRS has no capacity to be sued, and that the plaintiffs should have named the United States as a party instead of the IRS, such defects are not fatal. *See Labry v. Internal Revenue Serv.*, 940 F. Supp. 148, 149 (E.D. La. 1996) (holding that although the United States rather than the IRS was the .proper party, a misnomer does not preclude removal under 28 U.S.C. § 1444); *Bernard v. Internal Revenue Service*, No. 91-30253-RV, 1991 WL 327960 (N.D. Fla. Dec. 13, 1991) (same). We agree with the reasoning of these decisions, and conclude that the plaintiffs' technical defect did not preclude removal in this case.

E. The plaintiffs' Constructive trust claim is not barred by the statute of limitations

The Butcher defendants also argue that the plaintiffs' constructive trust claim is barred by the statute of limitations, which they insist is six years. The applicable statute of limitations, however, is fifteen years for the recovery of land. *See* M.C.L. § 600.5801(4); *Gorte v. Department of Transportation*, 507 N.W.2d 797, 799 (Mich. Ct. App. 1993). Because the first deed Was not delivered to the plaintiffs until October 22, 1981, and became the plaintiffs brought suit in state court against the defendants on October

16, 1991, the plaintiffs' constructive trust claim is not barred by the statute of limitations.

The Butcher defendants, on the other hand, contend that the accrual date of the plaintiffs' claim is July 12, 1978, the date on which LTDC conveyed title to the Butchers. This contention is erroneous because the plaintiffs' claim did not accrue until they became entitled to the possession of the land, which was when they received their warranty deeds. *See* M.C.L. § 600.5829(5) C[T]he claim accrues when the claimant Or the person under whom he claims first becomes entitled to the possession of the premises under the title upon which the entry or action is founded."). In any event, even an accrual date of July 12, 1978 is still within fifteen years of October 16, 1991. Accordingly, we affirm the district court on this issue.

H. The district court's order granting summary judgment is valid as to Rosemary

The Butcher defendants next contend that the constructive trust is void as against Rosemary because it was imposed on December 14, 1998, at which time Rosemary had not yet been served with a summons and copy of the amended complaint. This argument was first raised in their motion for reconsideration, following the award of summary judgment to the plaintiffs. The district court partially agreed with this argument and ordered the plaintiffs to serve Rosemary with a summons and copy of the amended complaint. It then gave her an opportunity to respond to the plaintiffs' arguments. Shortly thereafter, the Butcher defendants fdeda supplemental motion for reconsideration. In that motion, they argued that the district court's order, which imposed the constructive trust, was void because the court had no authority to assert personal jurisdiction over Rosemary after entering a final

judgment. Contrary to the Butcher defendants' arguments, the district court had the authority to amend its judgment based on its mistaken belief that Rosemary had been served in her individual capacity. *See Kingvision Pay-Per-View Ltd., v. Lake Alice Bar*, 168 F.3d 347, 350 (9th Cir. 1999) (holding, in a case where the plaintiff had argued that "the district court lacked jurisdiction to amend its judgment more than ten days after entry, because that is the time limit under Federal Rule of Civil Procedure 59," that a district court can amend its judgment because of mistake or inadvertence months after judgment has been entered pursuant to Rule 60Co) of the Federal Rules of Civil Procedure.) We agree with this reasoning, and conclude that the district court correctly rejected this argument.

With respect to personal jurisdiction, the district court obtained jurisdiction over Rosemary when Robert Butcher, counsel for the Butcher defendants, received a copy of the amended complaint on Rosemary's behalf. He had agreed to accept service of the amended complaint on her behalf and to return a waiver of service of the summons. Rosemary's argument that acceptance of the amended complaint by Robert Butcher was contingent upon her receipt of additional time to respond to the district court's order should have been immediately raised and clearly articulated in a proper motion. Because she failed to do so, this argument is procedurally defaulted. *See Trustees of Central Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 732 (7th Cir. 1991) ("A party may waive a defense of insufficiency of process by failing to assert it seasonably in a motion... Where a defendant leads a plaintiff to believe that service is adequate.., courts have not hesitated to conclude that the defense is waived.")

Moreover, Rosemary had been previously served with the amended complaint in her capacity as a personal

representative of Alexander's estate. She had notice and an opportunity to be heard. In fact, Rosemary, in her individual capacity, filed a twenty-one page response on February 19, 1999, arguing that the plaintiffs should not be granted summary judgment.

Rosemary was also properly added as a defendant because Alexander's interest in the property, which is the subject of the suit, was transferred to her during the course of the litigation. Rule 25(c) of the Federal Rules of Civil Procedure provides as follows:

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

"Rule 25(c) does not require that anything be done after an interest has been transferred." *Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 71 (3d Cir. 1993) (internal quotation marks and citation omitted). Moreover, "although substitution is usually effected during the course of litigation, substitution has been upheld even after litigation has ended as long as the transfer of interest occurred during the pendency of the case." *Id. The* addition of Rosemary as a defendant was based upon her receipt of Alexander's interest after the case was filed against Alexander. Because the plaintiffs' claim against Rosemary is a continuation of their claim against Alexander, that claim is not barred by the applicable statute of limitations. *See id.* at 71. Consequently, Rosemary's substitution into the case was appropriate.

I. Other arguments raised by the Butcher defendants

The Butcher defendants have also raised arguments that (1) the statute of frauds prevents imposition of the constructive trust, (2) the bankruptcy court had no authority to transfer the constructive trust claim to the Western District of Michigan because the claim had been rendered moot, (3) the action was rendered moot when Alexander was substituted out of the ease, (4) there is no unjust enrichment when a title insurer pays its policy claims, (5) equity has no jurisdiction where the legal relief is adequate, (6) there can be no constructive trnst because the plaintiffs never acquired good title, and (7) if Alexander obtained the 17.83 acres improperly, then he did not have any interest to quitclaim to Rosemary. Most of these arguments are poorly articulated and are variations of other arguments that have already been addressed. All are totally without merit. Accordingly, after carefully reviewing the arguments and finding them unavailing, we affirm the district court on these issues for the reasons set forth in its order and judgment without further discussion.

III. CONCLUSION

For all of the reasons set forth above, we REVERSE the portion of the district court's judgment holding that the IRS's tax lien is subordinate to the plaintiffs' constructive trust. In all other respects, we AFFIRM the judgment of the district court.

CONCURRING IN PART, DISSENTING IN PART

SILER, Circuit Judge, concurring in part and dissenting in part. I would affirm the decision of the district court in full. Therefore, I concur in most of the conclusions made by the

majority opinion, but I dissent from that part of the decision Which holds that the district court erred in finding that the constructive trust was retroactive to 1978 and, therefore, was superior to the 1988 tax lien filed by the IRS.

Although, as the majority finds, there is language in cases from this court which would support a determination that the federal tax lien is superior to the interest of constructive trust beneficiaries, those cases arose under entirely different circumstances. For instance, while *In re Omega.y Group, Inc.,* 16 F.3d 1443, 1451 (6th Cir. 1984), declared that a constructive trust does not exist until a judicial decision determines that it exists, it arose out of a bankruptcy proceeding. It was enforcing .a bankruptcy policy under 11 U.S.C. § 541(d), as the court cited with approval the decision *in The Oxford Organisation, Ltd. v. Peterson,* 144 B.R. 385, 388 (1992). It related the general policy that the statute does not allow a claimant of the debtor "to take ahead of all creditors, and indeed, ahead of the trustee." *In re Omegas Group, Inc.,* 16 F.3d at 1451.

Similarly, in the case of *United States v. Dishman Indep. Oil, Inc.,* 46 F.3d 523,526 (6th Cir. 1995), this court held that the federal tax lien in that case was superior to a prejudgment lien filed by the creditor of the taxpayer. It did not involve a constructive trust at all. It set out the priority of a federal tax lien under the Tax Code, which is not directly in point here, because the prejudgment lien was not the same as a judgment lien checks and the IRS had filed tax liens against the Butchers before the condominium owners had discovered the fraud. Under the majority's decision, if a court later declared a constructive trust over the realty, the federal tax lien would prevail. That would be both unfair and inequitable to the condominium owners and I do not think it should be the law of this circuit.

Therefore, I would affirm the district court in full.

APPENDIX D

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

No. 91-1648 CH

[Filed November 18, 1991]

JOBST W.F. BLACHY and LYNNE A. BLACHY, DAVIDA GALE, TRUSTEE, PETER E. BOSS AND JEANETTE A. BOSS, KENNETH W. GITLIN and ROSLYNE GITLIN, JOSEPH H. JONES and BARBARA ANN JONES, T F C AGENCY, INC., a Michigan corp., GEORGE F. MALLEY and BARBARA C. MALLEY, RICHARD A. MONASH and CAROL MONASH, E. JEROME McCARTHY, GUNTHER S. MEISSE and JEANNE R. MEISSE, IRVING SHANBOMB and PATRICIA SHANBOMB, RONALD W. MITCHELL and PATRICIA W. MITCHELL,ANTHONY J. D'ERRICO and ANN T. D'ERRICO, NORTHWESTERN SAVINGS AND LOAN ASSOCIATION, LAWYERS TITLE INSURANCE)

CORPORATION, a Virginia corporation, jointly and severally,
Plaintiffs,

ALEXANDER M. BUTCHER; LITTLE TRAVERSE DEVELOPMENT CO., a Michigan corporation; H.C. DEVELOPMENT CO., a Michigan corporation; INTERNAL REVENUE SERVICE,
Defendants.

Hon. Richard M. Pajtas

NOTICE OF REMOVAL

NOW COMES defendant Internal Revenue Service, by and through its attorneys, John A. Smietanka, United States Attorney, and Daniel M. LaVille, Assistant United States Attorney, and files this Notice of Removal of the instant case from Emmet County Circuit Court, State of Michigan, for the following reasons:

1. The instant case was originally filed in the Circuit Court for the County of Emmet, State of Michigan, on or about October 16, 1991. It is designated Circuit Court Case No. 91-1648 CH. (Complaint attached hereto as Exhibit A.)

2. A copy of plaintiff's Complaint was received by the United States Attorney's Office on October 21, 1991.

3. This action is removable pursuant to 28 U.S.C. § 1441 and § 1444 as it is a quiet title action commenced in a State

court against a governmental agency in which the United States has original jurisdiction pursuant to 28 U.S.C. 2410.

4. This notice is fried within thirty days after this defendant received a copy of the Complaint.

5. By filing this Notice of Removal the defendant Internal Revenue Service does not waive any legal defenses in this matter but expressly reserves its right to raise any and all legal defenses in subsequent pleadings in this Court.

WHEREFORE, the defendant represents that the removal statutes have been complied, with and thus, this case stands removed from the Emmet County Circuit Court to the United States District Court for the Western District of Michigan, Southern Division.

JOHN A. SMIETANKA United States Attorney

/s/

DANIEL M. LAVILLE
Assistant United States Attorney
399 Ford Federal Building
Grand Rapids, Michigan 49503
(616) 456-2404

Dated: November 18, 1991

APPENDIX E

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF EMMET

No. 91-1648-CH

[October 16, 1991]

JOBST W.F. BLACHY and LYNNE A. BLACHY, DAVIDA GALE, TRUSTEE, PETER E. BOSS AND JEANETTE A. BOSS, KENNETH W. GITLIN and ROSLYNE GITLIN, JOSEPH H. JONES and BARBARA ANN JONES, T F C AGENCY, INC., a Michigan corp., GEORGE F. MALLEY and BARBARA C. MALLEY, RICHARD A. MONASH and CAROL MONASH, E. JEROME McCARTHY, GUNTHER S. MEISSE and JEANNE R. MEISSE, IRVING SHANBOMB and PATRICIA SHANBOMB, RONALD W. MITCHELL and PATRICIA W. MITCHELL,ANTHONY J. D'ERRICO and ANN T. D'ERRICO, NORTHWESTERN SAVINGS AND LOAN ASSOCIATION, LAWYERS TITLE INSURANCE

CORPORATION, a Virginia corporation, jointly and severally,
Plaintiffs,

ALEXANDER M. BUTCHER; LITTLE TRAVERSE DEVELOPMENT CO., a Michigan corporation; H.C. DEVELOPMENT CO., a Michigan corporation; INTERNAL REVENUE SERVICE,
Defendants.

THERE IS NO OTHER CIVIL ACTION BETWEEN THESE PARTIES ARISING OUT OF THE SAME TRANSACTION OR OCCURRENCE AS ALLEGED IN THIS COMPLAINT PENDING IN THIS COURT, NOR HAS ANY SUCH ACTION BEEN PREVIOUSLY FILED AND DISMISSED OR TRANSFERRED AFTERHAVING BEEN ASSIGNED TO A JUDGE, NOR DO I KNOW OF ANY OTHER CIVIL ACTION, NOT BETWEEN THESE PARTIES, ARISING OUT OF THE SAME TRANSACTION OR OCCURRENCE AS ALLEGED IN THIS COMPLAINT THAT IS EITHER PENDING OR WAS PREVIOUSLY FILED AND DISMISSED, TRANSFERRED, OR OTHERWISE DISPOSED OF AFTER HAVINGBEEN ASSIGNED TO A JUDGE IN THIS COURT.

COMPLAINT

PLAINTIFFS, JOBST W.F. BLACHY and LYNNE A. BLACHY, DAVIDA GALE, TRUSTEE, PETER E. BOSS and JEANETTE A. BOSS, KENNETH W. GITLIN and ROSLYNE GITLIN, JOSEPH H. JONES and BARBARA ANN JONES, T F C AGENCY, INC., a Michigan

corporation, GEORGE F. MALLEY and BARBARA C. MALLEY, RICHARD A. MONASH and CAROL MONASH, E. JEROME McCARTHY, GUNTHER S. MEISSE and JEANNE R. MEISSE, and IRVING SHANBOM and PATRICIA SHANBOM, RONALD W. MITCHELL and PATRICIA W. MITCHELL, ANTHONY J. D'ERRICO and ANN T. D'ERRICO, NORTHWESTERN SAVINGS AND LOAN ASSOCIATION, LAWYERS TITLE INSURANCE CORPORATION, by and through their attorneys, Plunkett & Cooney, P.C., state for their Complaint against Defendants, Alexander M. Butcher; Little Traverse Development Co., H.C. Development Co. and Internal Revenue Service, as follows:

PARTIES, JURISDICTION AND COMMON ALLEGATIONS

1. The following Plaintiffs own real property in Emmet County, Michigan:

a. Davida Gale, Unit 90
b. Dr. Peter E. Boss and Jeanette A. Boss, Unit 91
c. Kenneth W. Gitlin and Roslyne Gitlin, Unit 93
d. Joseph H. Jones and Barbara Ann Jones, Unit 94
e. Anthony J. D'errico and Ann T. D'errico, Unit 95
f. T F C Agency, Inc., Unit 96
g. Irving Shanbom and Patricia Shanbom, Unit 98
h. Gunther S. Meisse and Jeanne R. Meisse, Unit 99
I. George F. Malley and Barbara C. Malley, Unit 102
j. Jobst W. F. Blachy and Lynne A. Blachy, Unit 103
k. E. Jerome McCarthy, Unit 105
l. Ronald W. Mitchell and Patricia W. Mitchell, Unit 108
m. Richard A. Monash and Carol A. Monash, Unit 113

n. Northwestern Savings and Loan Association, Vacant Land

2. Plaintiff, Lawyers Title Insurance Corporation is a Virginia corporation and does business in Emmet County, Michigan.

3. At the times involved in this matter, Defendant, Alexander M. Butcher, did business in Emmet County, Michigan, and is believed now to reside in Southfield, Michigan.

4. Rosemary C. Butcher filed bankruptcy under Chapter 7, Eastern District, Southern Division, Case No. 91-02274-S, and the automatic stay has not been lifted.

5. Defendant, Little Traverse Development Co., is a Michigan corporation which at all times set forth in this Complaint conducted business in Emmet County, Michigan and was automatically dissolved on May 15, 1991 for failure to file its Michigan annual report.

6. Defendant, H.C. Development Co., is a Michigan corporation which at all times set forth in this Complaint conducted business in Emmet County, Michigan and was automatically dissolved on May 15, 1988 for failure to file its Michigan annual report.

7. Alexander M. Butcher was the President of Little Traverse Development Co. from 1978 through and including 1989, according to the Michigan Annual Reports filed with the Corporation and Securities Bureau.

8. Rosemary C. Butcher, wife of Alexander M. Butcher, was the Secretary of Little Traverse Development Co. from

1978 through and including 1989, according to the Michigan Annual Reports filed with the Corporation and Securities Bureau.

9. Alexander M. Butcher was the President of H.C. Development Co. at its inception in 1983 and is believed to have been the President thereafter.

10. Jurisdiction and venue are proper with this Court because the subject matter of this action deals with real property located in Little Traverse Township, Emmet County, Michigan, described as follows and hereinafter referred to as "the land":

> Part of the South 1/2 of Section 16, T35N, RSW, Little Traverse Township, Emmet County, Michigan, described as: Commencing at the West 1/4 corner of Section 16, T35N, R5W, Emmet County, Michigan; thence $89"32'30" E 2376.18 feet; thence S 9"46'50" W 350.00 feet to the PLACE OF BEGINNING; thence S 52"12'20" E 1025.94 feet; thence S 4°0· E 263.00 feet; thence S 54"0' W 93.00 feet; thence S 44024· W 439.21 feet; thence along the centerline of Beach Drive on the following courses: N 73"41'50" W 368.52 feet, and N 73015· W 290.00 feet; thence N 9"46'50" E 1088.34 feet to the Place of Beginning; containing 17.83 acres more or less.

11. On April 9, 1969, Susan Briggs Fisher deeded "the land" and other real property to Harbor Haven On The Bay, Inc., which deed was recorded in Liber 220, Page 787, Emmet County Records. (Exhibit 1)

12. On August 1, 1972, Harbor Haven On The Bay, Inc. deeded "the land" and other real property to RBA Properties,

which deed was recorded in Liber 241, Page 730, Emmet County Records. (Exhibit 2)

13. On January 2, 1973, RBA Properties deeded "the land" and other real property to Butcher and Associates, Inc., which deed was recorded in Liber 244, Page 985, Emmet County Records. (Exhibit 3).

14. On January 2, 1973, Butcher and Associates, Inc. deeded "the land" and other real property to Cedar Cove, which deed was recorded in Liber 264, Page 198, Emmet County Records. (Exhibit 4).

15. On June 30, 1978, Cedar Cove deeded "the land" and other real property to Alexander M. Butcher and Rosemary C. Butcher, which deed was recorded in Liber 286, Page 387, Emmet County Records. (Exhibit 5)

16. On July 6, 1978, Alexander M. Butcher and Rosemary C. Butcher deed #the land[m] and other real property to Little Traverse Development Co., which deed was recorded in Liber 286, Page 390, Emmet County Records. (Exhibit 6)

17. On July 12, 1978, Little Traverse Development Co. deeded mthe land[x] to Alexander M. Butcher and Rosemary C. Butcher, his wife, which deed was recorded in Liber 286, Page 527, Emmet County Records.
(Exhibit 7)

18. On November i, 1978, Little Traverse Development Co., by its President Alexander M. Butcher, executed a Master Deed wherein all of #the land" was included in the condominium project, Harbor Cove Phase II, recorded in Liber 290, Page 272 through 320, Emmet County Records. (Exhibit 8)

19. Little Traverse Development Co. sold condominium units in Harbor Cove Phase II, located on #the land" to the following persons:

a. Jack M. Gale and Davida Gale, Unit 90 by Warranty Deed dated October 22, 1981, and recorded November 24, 1982, in Liber 324, Pages 436, Emmet County Records.

b. Dr. Peter E. Boss and Jeanette A. Boss, Unit 91 by Warranty Deed dated March 9, 1984, and recorded March 13, 1984, in Liber 337, Page 370, Emmet County Records.

c. A.G.A. Studio, Inc., Unit 92 by Warranty Deed dated December 18, 1981, and recorded January 13, 1984, in Liber 335, Page 847, Emmet County Records.

d. Kenneth W. Gitlin and Roslyne Gitlin, Unit 93 by Warranty Deed dated March 24, 1982, and recorded November 16, 1982, in Liber 324, Page 252, Emmet County Records.

e. Roger L. Gonda and Yvonne E. Gonda, Unit 94 by Warranty Deed dated March 9, 1984, and recorded March 13, 1984, in Liber 337, Page 377, Emmet County Records.

f. Anthony J. D'errico and Ann T. D'errico, Unit 95 by Warranty Deed dated November 21, 1981, and recorded November 29, 1982, in Liber 324, Page 467, Emmet County Records.

g. T F C Agency, Inc., Unit 96 by Warranty Deed dated January 28, 1984, and recorded February 7, 1984, in Liber 336, Page 467, Emmet County Records.

h. Curtis C. Haan and Margaret J. Haan, and Eleanor Haan, Unit 97 by Warranty Deed dated March 7, 1983, and recorded April 5, 1983 in Liber 327, Page 631, Emmet County Records.

I. Irving Shanbom and Patricia Shanbom, Unit 98 by Warranty Deed dated December 6, 1982, and recorded January 5, 1983, in Liber 325, Page 510, Emmet County Records.

j. Gunther S. Meisse and Jeanne R. Meisse, Unit 99 by Warranty Deed dated June 27, 1983, and recorded June 30, 1983, in Liber 329, Page 916, Emmet County Records.

k. Dr. Richard J. Dobies and Florence H. Dobies, Unit 100 by Warranty Deed dated February 16, 1984, and recorded May 7, 1984, in Liber 338, Page 764, Emmet County Records.

l. Donald R. Tope, Sr., Unit 101 by Warranty Deed dated August 7, 1982, and recorded August 13, 1982, in Liber 321, Page 696, Emmet County Records

m. George F. Malley and Barbara C. Malley, Unit 102 by Warranty Deed dated April 21, 1983, and recorded April 29, 1983, in Liber 328, Page 280, Emmet County Records.

n. Jobst W. F. Blachy and Lynne A. Blachy, Unit 103 by Warranty Deed dated December 5, 1984, and

recorded December 12, 1984, in Liber 345, Page 855, Emmet County Records.

o. Steven J. Fishman and Windsor W. Fishman, Unit 104 by Warranty Deed dated May 20, 1983, and recorded May 31, 1983, in Liber 329, Page63, Emmet County Records.

20. In addition to the units referred to in paragraph 18 above, all 62 condominium units in Harbor Cove Phase II have an interest in that portion of "the land" which is located within the boundaries of Harbor Cove Phase II and is a general common element appurtenant to all units within Harbor Cove Phase II.

21. On November 12, 1981, Little Traverse Development Co., by its President Alexander M. Butcher, executed the Third Amendment to Master Deed of Harbor Cove Phase II, recorded in Liber 315, Page 728 through 750, Emmet County Records, wherein a portion of "the land" was withdrawn from the condominium project (Exhibit 9)

22. On October 23, 1984, Little Traverse Development Co., by its President, Alexander M. Butcher, deeded to H.C. Development Co., a Michigan corporation, a portion of "the land" in a deed recorded in Liber 344, Page 896, Emmet County Records. (Exhibit 10)

23. H.C. Development Co., by its President, Alexander M. Butcher, created a condominium project, Harbor Cove Phase III, by virtue of a Master Deed dated November 7, 1984, and recorded in Liber 344, Page 901 through 939, inclusive, (Exhibit ii) which condominium project is totally located on a portion of "the land" described as follows:

Part of the South 1/2 of Section 16, T35N, R5W, Little Traverse Township, Emmet County, Michlgan, described as: Commencing at the West 1/4 corner of Section 16, T35N, R5W, Emmet County, Michigan; thence along the East and West 1/4 line of said Section 16 South 89"32'30" East 2376.18 feet; thence South 9"46'50" West 404.09 feet; thence South 40"50' East 601.96 feet to the Place of Beginning; thence continuing South 40"50' East 320.00 feet; thence South 13"51'40" West 340.00 feet; thence North 29"15' West 493.00 feet; thence North 38"31'26" East 181.60 feet to the Place of Beginning, containing 1.97 acres more or less.

24. On November 8, 1984, H.C. Development Co., by its President, Alexander M. Butcher, mortgaged a portion of "the land" which was made a part of Harbor Cove Phase III and that portion of its land known as "future development land" to Northwestern Savings Bank to secure a promissory note in the amount of $1.3 million and which mortgage was recorded in Liber 345, Page 012, Emmet County Records. (Exhibit 12)

25. H.C. Development Co. created nine condominium units in its condominium project, Harbor Cove Phase III, which condominium units were sold to the following Plaintiffs:

a. Northwestern Savings and Loan Association, Units 105, 106, 107, 109, 110, 112 and 113, by Warranty Deed dated January 28, 1987, and recorded February 13, 1987, in Liber 377, Page 415, Emmet County Records.

b. Ronald W. Mitchell and Patricia W. Mitchell, Unit 108, by Warranty Deed dated December 5, 1985, and recorded December 5, 1985, in Liber 357, Page 838, Emmet County Records.

c. Harry Warholak and Dorothy O. Warholak, Unit 109, by Warranty Deed dated December 20, 1985, and recorded April 7, 1986, in Liber 362, Page 51, Emmet County Records.

d. Thomas G. Allshouse and Sheryle K. Allshouse, Unit 111, by Warranty Deed dated August 12, 1985, and recorded August 13, 1985, in Liber 353, Page 168, Emmet County Records.

26. On December 13, 1988, Donald Arman, Deputy Sheriff in and for the County of Emmet, conducted a public sale of a portion of "the land" due to the default of the mortgage dated November 8, 1984 by H.C. Development Co., as Mortgagor, to Northwestern Savings and Loan Association, as Mortgagee.

27. Northwestern Savings and Loan Association was the highest bidder at said public sale, H.C. Development Co. did not redeem, and Northwestern Savings and Loan Association received title through the Sheriff's Deed recorded December 13, 1988, in Liber 405, Pages 473 through 481, inclusive, Emmet County Records.

28 Lawyers Title Insurance Corp. is in the business of issuing title insurance policies.

29. Little Traverse Development Co. and H.C. Development Co. had requested Lawyers Title Insurance Corp., through its agent, Little Traverse Title Company,

located in Petoskey, Michigan, to issue policies of title insurance insuring the title of purchasers of condominium units in Harbor Cove Phase II and Harbor Cove Phase III, as well as a policy of title insurance to insure the mortgage of Northwestern Savings and Loan Association given by H.C. Development Co. to said bank.

30. Plaintiffs' condominium units:

a. are located on "the land"; and

b. are affected by the deed from Little Traverse Development Co. to Alexander M. Butcher and Rosemary C. Butcher (Exhibit 7).

31. Plaintiffs have title insurance policies issued by Lawyers Title Insurance Corp. and have made claims to said title insurer to resolve the matter of the deed (Exhibit 7).

32. Defendant, Internal Revenue Service, has filed Notices of Federal Tax Liens against Alexander M. Butcher and Rosemary C. Butcher with the Emmet County Register of Deeds. The liens are recorded in:

Liber 386, Page 826, dated September 22, 1987
Liber 401, Page 147, dated September 9, 1988
Liber 406, Page 098, dated December 23, 1988
Liber 410, Page 198, dated April 19, 1989
Liber 424, Page 851, dated March 6, 1990

COUNT I - CONSTRUCTIVE TRUST

33. Plaintiffs hereby incorporate paragraphs 1 through 32 as if fully set forth herein.

34. Plaintiffs requested Alexander M. Butcher and Rosemary C. Butcher to acknowledge that the deed recorded in Liber 286, Page 527 (Exhibit 7) was a mistake and should be void and of no effect. Plaintiffs further requested Alexander M. Butcher and Rosemary C. Butcher acknowledge that said deed was not intended to defeat title of Little Traverse Development Co. or H.C. Development Co. and each corporation's acts in forming Harbor Cove Phase II and Harbor Cove Phase III.

35. Alexander M. Butcher and Rosemary C. Butcher are unwilling to acknowledge that the deed recorded in Liber 286, Page 527 (Exhibit 7), was a mistake and void and not intended to transfer title to them.

36. Little Traverse Development Co. and H.C. Development Co. are unwilling to acknowledge that the deed recorded in Liber 286, Page 527 (Exhibit 7) was a mistake and void and not intended to transfer title to Alexander M. Butcher and Rosemary C. Butcher.

37. Alexander M. Butcher and Rosemary C. Butcher, as officers of Little Traverse Development Co., were in a position to know that if the deed to themselves, as husband and wife, recorded in Liber 286, Page 527 (Exhibit 7) was valid, then all corporate actions which they undertook as officers of the corporation to create Harbor Cove Phase II and all sales of condominium units in said project to third parties would be fraudulent.

38. Alexander M. Butcher and Rosemary C. Butcher, as officers of Little Traverse Development Co., were in a position to know that if the deed to themselves, as husband and wife, recorded in Liber 286, Page 527 (Exhibit 7) was valid, then all corporate actions which they undertook as

officers of the corporation to remove a portion of "the land" from Harbor Cove Phase II and deed the same to H.C. Development Co., which then created Harbor Cove Phase III, and all sales of condominium units in Harbor Cove Phase III to third parties would be fraudulent.

39. It is unconscionable that Alexander M. Butcher and Rosemary C. Butcher, as officers of Little Traverse Development Co., could deed "the land" to themselves and then, continuing to act in their corporate capacity, create condominium projects on "the land" and continue to represent "the land" as a corporate asset and sell condominium units located on "the land" to innocent third parties and later claim an interest in the innocent third parties' condominium units.

40. On information and belief, Alexander M. Butcher and Rosemary C. Butcher have not paid any real property taxes on any portion of "the land" since 1978.

41. Alexander M. Butcher and Rosemary C. Butcher have taken no action to claim possession of any portion of "the land" from the time Little Traverse Development Co. created Harbor Cove Phase II on November i, 1978, to the present.

COUNT II - BREACH OF WARRANTY DEEDS (LITTTLE TRAVERSE DEVELOPMENT CO.)

42. Plaintiffs hereby incorporate paragraphs 1 through 41 as if fully set forth herein.

43. Little Traverse Development Co. conveyed and transferred the condominium units in Harbor Cove Phase II to the Plaintiffs or their predecessors by way of warranty deed.

44. In conveying the units in Harbor Cove Phase II, Little Traverse Development Co. covenanted in said Warranty Deeds to the respective Plaintiffs or their predecessors that it was seised of the premises, had good right to convey them and that it would guarantee Plaintiffs quiet possession.

45. Little Traverse Development Co. further warranted that the units were free from encumbrance and that it would warrant and defend title to the units against all loss or potential loss of claims.

46. At the time it conveyed title to Plaintiffs or their predecessors by virtue of a warranty deed, Little Traverse Development Co. was not seised with record title to the various condominium units, nor did it have the right to convey or give quiet possession.

47. Little Traverse Development Co. breached the covenants of seisin, the right to convey and quiet possession, and the warranty that the units were free from encumbrances.

48. The deed attached as Exhibit 7 is an encumbrance against Plaintiffs' condominium units.

49. Little Traverse Development Co.'s breach of the covenants and warranties in its deed has caused Plaintiffs damages.

50. Plaintiffs demand that Little Traverse Development Co. defend title to Plaintiffs' condominium units and land, however, because Alexander M. Butcher is or was the President and sole shareholder of said corporation; making any such demand is a futile act.

51. Alexander M. Butcher, through his attorney, has refused to defend title on behalf of Little Traverse Development Co.

COUNT III- BREACH OF WARRANTY DEEDS (H.C. DEVELOPMENT CO.)

52. Plaintiffs hereby incorporate paragraphs 1 through 51 as if fully set forth herein.

53. H.C. Development Co. conveyed and transferred the condominium units in Harbor Cove Phase III by way of warranty deed.

54. In conveying the units in Harbor Cove Phase III, H.C. Development Co. covenanted in said warranty deeds to the respective Plaintiffs or their predecessor that it was seised of the premises, had good right to convey them and that it would guarantee Plaintiffs' quiet possession.

55. H.C. Development Co. further warranted that the units were free from encumbrances and that it would warrant and defend title to the units against all loss or potential loss of claims.

56. At the time it conveyed title to Plaintiffs or their predecessor by virtue of a warranty deed, H.C. Development Co. was not seised with record title to the various condominium units, nor did it have the right to convey or give quiet possession.

57. H.C. Development Co. breached the covenants of seisin, the right to convey and quiet possession, and the warranty that the units were free from encumbrances.

58. The deed attached as Exhibit 7 is an encumbrance against Plaintiffs" condominium units.

59. H.C. Development Co.'s breach of the covenants and warranties in its deed has caused Plaintiffs damages.

60. Plaintiffs demand that H.C. Development Co. defend title to Plaintiffs' condominium units, however, because Alexander M. Butcher is or was the President and majority shareholder of said corporation, making any such demand is a futile act.

61. Alexander M. Butcher, through his attorney, has refused/to defend title on behalf of H.C. Development Co.

COUNT IV - FRAUDULENT MISREPRESENTATION

62. Plaintiffs hereby incorporate paragraphs 1 through 61 as if fully set forth herein.

63. Defendants, jointly and severally, represented to Plaintiffs or their predecessors in connection with the purchase of units in Harbor Cove Phase II that Little Traverse Development Co. owned "the land" and was vested with legal, equitable and marketable title to the units.

64. Defendants, jointly and severally, represented to Plaintiffs or their predecessors in connection with the purchase of units in Harbor Cove Phase III that H.C. Development Co. was vested with legal, equitable, and marketable title to the units.

65. In making said representations, Defendants, jointly and severally, knew or should have known that record title to

"the land" and units was in the name of Alexander M. Butcher and Rosemary C. Butcher.

66. Defendants, jointly and severally, intended that Plaintiffs or their predecessors rely on their representation that Little Traverse Development Co. was the owner of the units sold in Harbor Cove Phase II.

67. Defendants, jointly and severally, intended that Plaintiffs or their predecessors rely on their representation that H.C. Development Co. was the owner of the units sold in Harbor Cove Phase III.

68. Plaintiffs or their predecessors relied on Defendants' representations to their detriment.

69. Plaintiffs have suffered injury and damages as a result of Defendants' actions.

COUNT V - INNOCENT MISREPRESENTATION

70. Plaintiffs hereby incorporate paragraphs 1 through 69 as if fully set forth herein.

71. Defendants, jointly and severally, represented to Plaintiffs or their predecessors in connection with the purchase of units in Harbor Cove Phase II that Little Traverse Development Co. was vested with legal, equitable and marketable title to the units.

72. Defendants, jointly and severally, represented to Plaintiffs or their predecessors in connection with the purchase of units in Harbor Cove Phase III that H.C.

Development Co. was vested with legal, equitable and marketable title to the units.

73. Defendants, jointly and severally, made said representations innocently or without knowledge of the deed attached as Exhibit 7.

74. Defendants, jointly and severally intended that Plaintiffs or their predecessors rely on their representation that Little Traverse Development Co. was the owner of the units sold in Harbor Cove Phase II.

75. Defendants, jointly and severally, intended that Plaintiffs or their predecessors rely on their representation that H.C. Development Co. was the owner of the units sold in Harbor Cove Phase III.

76. Plaintiffs or their predecessors relied on Defendants' representations to their detriment.

77. Plaintiffs have suffered injury and damages as a result of Defendants' actions.

COUNT VI - EQUITABLE ESTOPPEL

78. Plaintiffs hereby incorporate paragraphs 1 through 77 as if fully set forth herein.

79. Alexander M. Butcher and Rosemary C. Butcher had full knowledge that Little Traverse Development Co. intended to create a condominium project, Harbor Cove Phase II, and intended to sell and convey title to the condominium units in Harbor Cove Phase II to third parties.

80. Alexander M. Butcher, as President of Little Traverse Development Co., deeded a portion of "the land" to H.C. Development Co. on October 23, 1984 so that Alexander M. Butcher as majority shareholder of H.C. Development Co. could create Harbor Cove Phase III condominium project.

81. Alexander M. Butcher and Rosemary C. Butcher had full knowledge that H.C. Development Co. intended to sell and convey title to the condominium units in Harbor Cove Phase III to third parties.

82. Plaintiffs or their predecessors purchased the condominium units from Little Traverse Development Co. and H.C. Development Co., as described above.

83. Alexander M. Butcher and Rosemary C. Butcher knowingly and intentionally caused and permitted Little Traverse Development Co. and H.C. Development Co. to convey the condominium units to Plaintiffs or their predecessors.

84. Alexander M. Butcher and Rosemary C. Butcher acquiesced in the sale of the condominium units to Plaintiffs or their predecessors.

85. At the time of the sale of each condominium unit, Alexander M. Butcher and Rosemary C. Butcher knew that Plaintiffs or their predecessors were relying on the apparent ownership of the condominium units by Little Traverse Development Co. or H.C. Development Co.

86. Plaintiffs or their predecessors did rely on the apparent ownership of Little Traverse Development Co. and H.C. Development Co. in purchasing their respective units.

87. Prior to Plaintiffs' or their predecessors' purchase of the units, Alexander M. Butcher and Rosemary C. Butcher took no action to advise or otherwise inform Plaintiffs or their predecessors that they had any interest in "the land".

88. At no time subsequent to Plaintiffs' or their predecessors' purchase of the units did Alexander M. Butcher or Rosemary C. Butcher take any action to advise or otherwise inform Plaintiffs or their predecessors of their interest in "the land".

COUNT VII - UNJUST ENRICHMENT

89. Plaintiffs hereby incorporate paragraphs 1 through 88 as if fully set forth herein.

90. Little Traverse Development Co. sold condominium units in Harbor Cove Phase II to Plaintiffs for valuable consideration.

91. H.C. Development Co. sold condominium units in Harbor Cove Phase III to Plaintiffs for valuable consideration.

92. Plaintiffs paid valuable consideration for the units.

93. Neither Little Traverse Development Co. nor H.C. Development Co. had marketable title to the units or #the land" at the time they sold condominium units to Plaintiffs or their predecessors.

94. Alexander M. Butcher is believed to be the sole shareholder of Little Traverse Development Co. and personally benefited from the sale of the units.

95. Alexander M. Butcher is believed to be the sole or majority shareholder of H.C. Development Co. and personally benefited from the sale of the units.

96. Defendants, jointly and severally, would be unjustly enriched if they are permitted to retain any interest in "the land" or the condominium units in Harbor Cove Phase II or Harbor Cove Phase III.

COUNT VIII - PERSONAL LIABILITY OF ALEXANDER M. BUTCHER

97. Plaintiffs hereby incorporate paragraphs 1 through 96 as if fully set forth herein.

98. Alexander M. Butcher is or was an officer of Little Traverse Development Co.

99. Alexander M. Butcher is or was a director of Little Traverse Development Co.

100. Alexander M. Butcher is or was a shareholder of Little Traverse Development Co.

101. Alexander M. Butcher is or was an officer of H.C. Development Co.

102. Alexander M. Butcher is or was a director of H.C. Development Co.

103. Alexander M. Butcher is or was a shareholder of H.C. Development Co.

104. Upon information and belief, Little Traverse Development Co. failed to comply with the following corporate formalities:

a. the corporation was not adequately capitalized;

b. the corporation conducted business without corporate formalities;

c. the corporation failed to keep proper books and records;

d. the corporation dealtwith third parties in a manner inconsistent with separate corporate existence;

e. the corporation conducted business as the alter ego of Alexander M. Butcher.

105. Upon information and bellef, H.C. Development Co. failed to comply with the following corporate formalities:

a. the corporation was not adequately capitalized;

b. the corporation conducted business without corporate formalities;

c. the corporation failed to keep proper books and records;

d. the corporation dealt with third parties in a manner xnconsistent with separate corporate existence;

e. the corporation conducted business as the alter ego of Alexander M. Butcher.

106. Alexander M. Butcher is personally liable for damages to Plaintiffs resulting from his fraudulent acts and misrepresentations, done in the name of Little Traverse Development Co. and H.C. Development Co.

107. Little Traverse Development Co. was automatically dissolved on May 15, 1991, by the Michigan Department of Commerce for failure to file an annual report.

108. H.C. Development Co. was automatically dissolved on May 15, 1988 by the Michigan Department of Commerce for failure to file an annual report.

109. Alexander M. Butcher is personally liable for the acts of Little Traverse Development Co. and H.C. Development Co. in selling the condominium units to Plaintiffs.

COUNT IX - ACTION TO DETERMINE INTEREST IN LAND

110. Plaintiffs hereby incorporate paragraphs 1 through 109 as if fully set forth herein.

111. Plaintiffs bring an action pursuant to MCR 3.411 to determine their interest in "the land".

112. Plaintiffs claim an interest in their respective condominium units as owner in fee simple derived from Little Traverse Development Co.

113. Defendants Alexander M. Butcher and Rosemary C. Butcher claim an interest in "the land" by virtue of the deed attached as Exhibit 7 derived from Little Traverse Development Co.

114. In the event this Court finds in favor of Defendant Alexander M. Butcher, Plaintiffs file this claim against Alexander M. Butcher for the amount that the present value of "the land" has been increased by improvements.

WHEREFORE, Plaintiffs pray that:

A. This Court determine that the deed recorded in Liber 286, Page 527, from Little Traverse Development Co. to Alexander M. Butcher is a mistake and is void and of no effect and did not transfer title to "the land" to Alexander M. Butcher and the title remained vested in Little Traverse Development Co.

B. This Court impose a constructive trust upon the interest, if any, of Alexander M. Butcher in mthe land[N]. In imposing such a constructive trust, Plaintiffs request this Court to determine that Alexander M. Butcher was holding "the land" in trust for the benefit of Little Traverse Development Co. and its successors and assigns, all of whom derive title from Little Traverse Development Co., and that equitable, legal and marketable title to Plaintiffs' condominium units in Harbor Cove Phase II and Harbor Cove Phase III be vested in Plaintiffs.

C. This Court determine that the actions of Little Traverse Development Co., through its President Alexander M. Butcher, in the creation of the Master Deed for Harbor Cove Phase II and the sale of condominium units 90 through 104, inclusive, are valid corporate acts which should be upheld.

D. This Court determine that the actions of Little Traverse Development Co. in selling a portion of Nthe land[n] to H.C. Development Co. and the subsequent creation of the condominium project, Harbor Cove Phase III, by H.C. Development Co. and the sale of units 105 through 113, inclusive, Harbor Cove Phase III, are valid corporate acts which should be upheld.

E. This Court determine that the Sheriff's Deed recorded in Liber 405, Page 473 through 481, inclusive, on December 13, 1988, pursuant to n foreclosure action be upheld as a valid foreclosure against H.C. Development Co.

F. The deed in lieu of foreclosure granted by H.C. Development Co. to Northwestern Savings and Loan Association recorded in Liber 377, Page 415, be upheld as a valid corporate act.

G. The title to all condominium units in Harbor Cove Phase II and Harbor Cove Phase III be quieted in the names of the co-owners of record who acquired title through Little Traverse Development Co. and/or H.C. Development Co.

H. In the alternative, if this Court finds title to "the land" to be in Alexander M. Butcher, Plaintiffs pray:

1. That Plaintiffs be awarded damages for the breach of warranties in the Warranty Deed issued by Little Traverse Development Co. and/or H.C. Development Co.

2. That Plaintiffs be awarded damages against Little Traverse Development Co. and/or H.C. Development Co. for fraud, misrepresentation, or innocent misrepresentation arising out of the sale of condominium units not owned by the corporation.

3. That Plaintiffs be awarded damages against Alexander M. Butcher, personally, for his actions as an officer, director and shareholder of Little Traverse Development Co. and H.C. Development Co. for the corporate acts which were fraudulent or constituted an intentional misrepresentation or innocent

misrepresentation, as well as failure to maintain the corporation in good standing.

4. That Plaintiffs be awarded monetary damages equal to the value of the improvements which they placed upon "the land", which Plaintiffs or their predecessors in title paid for.

I. This Court determine that the tax liens filed by the Internal Revenue Service against Alexander M. Butcher are null and void as to "the land" for the reason that any interest of Alexander M. Butcher in "the land" terminated when "the land" was committed to a condominium project on November I, 1978.

J. This Court award Plaintiffs all damages, costs, and reasonable attorney fees.

K. This Court grant such other relief as the Court may find agreeable in equity and good conscience and to avoid any further multiplicity of lawsuits arising out of the deed recorded in Liber 286, Page 527.

Respectfully submitted,

PLUNKETT & COONEY, P.C.

/s/ William w. Hofmann
William W. Hofmann
Attorney for Plaintiff

Dated: October 16, 1991

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

No. 1:91-CV-979

[Filed December 14, 1998]

JOBST W.F. BLACHY, et al.,)
Plaintiffs,)
)
v.)
)
ROBERT BUTCHER, et al.,)
Defendants.)
)

HON. GORDON J. QUIST

ORDER

In accordance with the Opinion filed on this date.

IT IS HEREBY ORDERED that Plaintiffs' Motion for Summary Judgment (docket no. 40) is GRANTED and that Defendant's-Motion for Summary Judgment (docket no. 33) is DENIED.

IT IS FURTHER ORDERED AND ADJUDGED that Alexander M. Butcher and Rosemary C. Butcher held title to the real property as constructive trustees for the benefit of Little Traverse Development Co., Harbor Cove Development Co., and those persons or entities to whom title was conveyed by said corporations as listed on Appendix A and Appendix B (attached hereto) and their heirs, successors, and assigns, which real property is describe as:

> Part of the South 1/2 of Section 16, T35N, R5W, Little Traverse, County of Emmet, and State of Michigan, described as: Commencing-at the West 1/4 corner of Section 16, T35N, R5W, Emmet County, Michigan; thence S89°32'30"E 2376.18 feet; thence S9°46'50"W 350.00 feet to the PLACE OF BEGINNING; thence S52°12'20"E 1025.94 feet; thence S4°0'E 263.00 feet; thence S54°0'w 93.00 feet; then S44°24'W 439.21 feet; thence along the centerline of Beach Drive on the following courses: N73°41 '50"W 36B.52 feet and N73°15'W 290.00 feet; thence N9°46'50"E 1088.34 feet to the Place of Beginning, containing 17.S3 acres, more or less,

which includes Units 90 through 104 of Harbor Cove Phase II, Emmet County Condominium Subdivision Plan No. 19, as recorded in the Master County records, and amendments thereto, and Units 105 through 113 of Harbor Cove Phase III, Emmet County Condominium Subdivision Plan No. 49, as recorded in the Master Deed of Harbor Cove Phase III in Liber 344, Pages 901-939, Emmet County Records, pursuant

to a deed dated July 12, 1978, recorded on July 14, 1978, in Liber 286, Pages 527, Emmet County Records (the "Property")

IT IS FURTHER ORDERED AND ADJUDGED that all Notices of Federal Tax Liens of the Internal Revenue Service filed against Alexander M. Butcher and Rosemary C. Butcher, including those dated September 22, 1987, September 9. 1998, December 23, 1989, April 19, 1989, and March 6, 1990, are subordinate to the interests of the persons or entities listed in Appendix A and Appendix B as owners, or their heirs, successors or assigns, and therefore, do not attach to Units 90 through 104 o f Harbor Cove Phase II and Units 105 through 113 of Harbor Cove Phase III or the property.

IT IS FURTHER ORDERED that a certified copy of this ORDER is to be filed in the EMMET County real property records to evidence the state of the title in the Property as legally defined as being both legally and equitably vested in the persons on Appendices A and B, their heirs, successors, and assigns as of July 12, 1978.

Dated: DECEMBER 14, 1998

/s/_____
GORDON QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Nos. 92-0173 and 93-4819

[February 11, 1994]

JOBST W.F. BLACHY, et al., Jointly and severally, Plaintiffs,	)
v.	)
ROBERT BUTCHER, et al., Defendants.	)

ORDER SUBSTITUTING INTEREST OF ALEXANDER BUTCHER

At a session of said court held in the United States Courthouse, Detroit, Michigan on February 11, 1994

PRESENT: HON. WALTER SHAPERO
U.S. Bankruptcy Judge

Came on for consideration for this day the Motion by Lawyers Title Insurance Corporation for Substitution of the

interest of Alexander M. Butcher. The court having reviewed the motion and the responses in opposition thereto, and upon due notice and hearing, and the court being otherwise fully advised in the premises, finds good cause to grant the relief as requested.

IT IS THEREFORE ORDERED that the Co-Personal Representatives of the probate estate of Alexander M. Butcher, being Rosemary C. Butcher and Robert E. Butcher, be substituted as a party to represent the interest of Alexander M. Butcher in the Consolidated Adversary Proceeding 92-0173 and 93-4819 for all purposes. The time periods specified in this Court's Amended Scheduling Order, dated July 9, 1993, Items 2 through 4, are now operative.

IT IS SO ORDERED.

/s/_____
WALTER SHAPERO
UNITED STATES BANKRUPTCY JUDGE